DOCKET

No. 13-271

Title:	Oneok, Inc., et al., Petitioners
	v.
	Learjet, Inc., et al.
Docketed:	August 28, 2013
Linked with 12A1194	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-16786, 11-16798, 11-16802, 11-16818, 11-16869, 11-16876)
Decision Date:	April 10, 2013

Questions Presented

--Date--	------Proceedings and Orders----------
Jun 10 2013	Application (12A1194) to extend the time to file a petition for a writ of certiorari from July 9, 2013 to September 6, 2013, submitted to Justice Kennedy.
Jun 20 2013	Application (12A1194) granted by Justice Kennedy extending the time to file until August 24, 2013.
Aug 26 2013	Petition for a writ of certiorari filed. (Response due September 27, 2013)
Sep 13 2013	Order extending time to file response to petition to and including October 28, 2013, for all respondents.
Sep 27 2013	Brief amicus curiae of Washington Legal Foundation filed.
Sep 27 2013	Brief amici curiae of Electric Power Supply Association, et al. filed.
Sep 27 2013	Brief amicus curiae of American Gas Association filed.
Sep 27 2013	Brief amicus curiae of Gas Processors Association filed.
Oct 25 2013	Brief of respondents Learjet, Inc., et al. in opposition filed.
Oct 25 2013	Brief of respondents Arandell Corp. et al. (Wisconsin Respondents) in opposition filed.
Nov 12 2013	DISTRIBUTED for Conference of November 26, 2013.
Nov 12 2013	Reply of petitioners Oneok, Inc., et al. filed. (Distributed)
Dec 2 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Alito took no part in the consideration or decision of this petition.
May 27 2014	Brief amicus curiae of United States filed.
Jun 9 2014	Supplemental brief of petitioners Oneok, Inc., et al. filed.
Jun 10 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 12 2014	Supplemental brief of respondents Learjet, Inc., et al. filed. (Distributed)
Jun 24 2014	Justice Alito is no longer recused in this case.
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Petition GRANTED.

Jul 17 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 18, 2014.
Jul 17 2014	The time to file respondents' brief on the merits is extended to and including November 21, 2014.
Sep 10 2014	Consent from the parties (petitioners, respondents Learjet and Arandell Corp., et al.) to the filing of amicus curiae briefs in support of either party or neither party received.
Sep 18 2014	Joint appendix filed (2 volumes). (Statement of costs filed)
Sep 18 2014	Brief of petitioners ONEOK, Inc., et al. filed.
Sep 25 2014	Brief amicus curiae of Washington Legal Foundation filed.
Sep 25 2014	Brief amici curiae of Interstate Natural Gas Association of America, et al. filed.
Sep 25 2014	Brief amicus curiae of the United States filed.
Sep 25 2014	Brief amici curiae of Noble Americas Energy Solutions, et al. filed.
Nov 21 2014	SET FOR ARGUMENT ON Monday, January 12, 2015.
Nov 21 2014	Brief of respondents Learjet, Inc., et al. filed.
Nov 21 2014	Brief of Wisconsin respondents filed.
Nov 26 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 26 2014	Brief amici curiae of Kansas, et al. filed.
Nov 26 2014	Brief amicus curiae of American Antitrust Institute filed.
Nov 26 2014	Motion of Kansas, et al for leave to participate in oral argument as amici curiae and for divided argument filed.
Dec 2 2014	CIRCULATED.
Dec 2 2014	Record requested from U.S.C.A. 9th Circuit.
Dec 2 2014	Record received from U.S.C.A. 9th Circuit, the record is electronic and located on PACER.
Dec 2 2014	Record recived from U.S.D.C. District of Nevada, the record is electronic and located on PACER.
Dec 15 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 15 2014	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
Dec 22 2014	Reply of petitioners ONEOK, Inc., et al. filed. (Distributed)
Jan 12 2015	Argued. For petitioners: Neal K. Katyal, Washington, D. C.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Jeffrey L. Fisher, Stanford, Cal.; and Stephen R. McAllister, Solicitor General, Topeka, Kan. (for Kansas, et al., as amici curiae.)
Apr 21 2015	Adjudged to be AFFIRMED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Alito, Sotomayor, and Kagan, JJ., joined, and in which Thomas, J., joined as to all but Part I-A. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., joined.
May 26 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13-271

No. 13-

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL*
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners
*Counsel of Record

[additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional counsel:

MICHAEL J. KASS
DOUGLAS R. TRIBBLE
KEVIN M. FONG
PILLSBURY WINTHROP
SHAW PITTMAN LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1000

Counsel for the defendant Dynegy entities

JOSHUA D. LICHTMAN
FULBRIGHT &
JAWORSKI L.L.P.
555 South Flower Street,
Forty-First Floor
Los Angeles, CA 90071
(213) 892-9200

Counsel for Shell Energy North America (U.S.), L.P.

ROXANNA A. MANUEL
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
865 S. Figueroa St., 10th
Floor
Los Angeles, CA 90017
(213) 443-3000

Counsel for Shell Energy North America (U.S.), L.P.

MARK E. HADDAD
MICHELLE B. GOODMAN
NITIN REDDY
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the defendant CMS entities

J. GREGORY COPELAND
MARK R. ROBECK
AARON STREETT
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for GenOn Energy, Inc.

OLIVER S. HOWARD
AMELIA A. FOGLEMAN
CRAIG A. FITZGERALD
GABLE GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4800

Counsel for the defendant ONEOK entities

BRENT A. BENOIT
STACY WILLIAMS
LOCKE LORD LLP
3400 J.P. Morgan Chase Tower
600 Travis
Houston, TX 77002
(713) 226-1200

Counsel for El Paso LLC

SARAH JANE GILLETT
HALL, ESTILL, HARDWICK, GABLE, GOLDEN, & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, OK 74103-3706
(918) 594-0400

Counsel for the defendant Williams and WPX entities

MICHAEL JOHN MIGUEL
KASOWITZ BENSON TORRES & FRIEDMAN LLP
2029 Century Park East
Suite 750
Los Angeles, California
90067
(424) 288-7900

Counsel for e prime, Inc.

STEVEN J. ROUTH
ORRICK, HERRINGTON, & SUTCLIFFE, L.L.P.
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for the defendant AEP entities

JOEL B. KLEINMAN
ADAM PROUJANSKY
LISA M. KAAS
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006
(202) 420-2200

Counsel for Duke Energy Trading and Marketing, L.L.C.

QUESTION PRESENTED

The Natural Gas Act occupies the field as to matters within its scope, preempting state regulation directed at practices that affect the wholesale natural gas market. Respondents brought state-law claims against natural gas companies, seeking to regulate industry practices that Respondents concede affected prices in the wholesale market. And yet the Ninth Circuit held—in direct conflict with two state courts of last resort—that Respondents' claims were not preempted because Respondents allegedly were damaged when they bought natural gas in *retail* sales, which fall outside federal jurisdiction.

The question presented is: Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit:

1. AEP Energy Services; American Electric Power Company, Inc.; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Marketing & Trading Company; Williams Merchant Services Company, Inc.; Williams Power Company, Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc., Petitioners on review, were defendants-appellees below.[1]

2. Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Merricks, Inc.; Sargento Foods, Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; Newpage Wisconsin System, Inc.; Reorganized FLI, Inc.; Sinclair Oil Corporation; Heartland Regional Medical Center; Prime Tanning Corp.; Northwest Missouri State

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[1] The Petitioners' corporate names are reproduced as they were typically listed in the docket below. Some Petitioners have undergone corporate reorganizations (and in some instances were sued under their names as reorganized). For purposes of recusal and completeness, updated corporate information is provided in the corporate disclosure statement at pp. iv-vii, *infra*.

University; and Muliut Corporation, Respondents on review, were plaintiffs-appellants below.

3. Duke Energy Corporation; CMS Energy Corporation; and Reliant Energy, Inc., Respondents on review, were defendants-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

AEP Energy Services, Inc. is an indirect, wholly owned subsidiary of American Electric Power Company, Inc., which is a publicly owned corporation.

American Electric Power Company, Inc. is a publicly owned corporation. American Electric Power Company, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of American Electric Power Company, Inc.'s stock.

CMS Marketing Services and Trading Company is now known as CMS Energy Resources Management Co. It is a wholly owned indirect subsidiary of CMS Energy Corp., a publicly traded company.

CMS Field Services Inc. was a former wholly-owned indirect subsidiary of CMS Energy Corp. CMS Field Services Inc. later changed its name to Cantera Gas Company and eventually was acquired by Copano Energy, L.L.C. Copano Energy, L.L.C. was acquired by Kinder Morgan Energy Partners LP, which is publicly traded. No other public company holds more than 10% of Kinder Morgan Energy Partners LP's stock.

Shell Energy North America (U.S.), L.P., is the successor in interest to Coral Energy Resources, L.P. Shell Energy North America is not itself a corporation, and has no direct publicly-owned parent corporation, but is indirectly wholly-owned by Royal Dutch Shell plc. Royal Dutch Shell plc is registered as a public company, but no publicly held corporation owns more than 10% of its stock.

Duke Energy Trading and Marketing, L.L.C. has as its parent companies DETMI Management, Inc. (60% owner) and Mobil Natural Gas, Inc. (40% owner).

Neither DETMI Management, Inc. nor Mobil Natural Gas, Inc. is a publicly held corporation. However, DETMI Management, Inc. and Mobil Natural Gas, Inc. are indirectly, wholly owned by Duke Energy Corporation and ExxonMobil Corporation, respectively, both publicly held corporations.

Dynegy Marketing and Trade is now Dynegy Marketing and Trade, LLC and is an indirect subsidiary of Dynegy Inc. DMT G.P. L.L.C. was previously merged into another entity that is now Dynegy Power Marketing, LLC, and is an indirect subsidiary of Dynegy Inc. Dynegy GP Inc. was previously merged into another entity that was Dynegy Holdings LLC, which was subsequently merged into Dynegy Inc. as a result of Dynegy Holdings LLC's and Dynegy Inc.'s bankruptcy proceedings. Dynegy Illinois Inc. was dissolved in June 2009. Prior to its dissolution, Dynegy Illinois Inc. was a wholly owned subsidiary of Dynegy Inc. Franklin Advisers, Inc., which is a subsidiary of Franklin Resources Inc., a publicly traded company, owns more than 10% of Dynegy Inc.'s common stock.

El Paso Corporation has changed its name to El Paso LLC. El Paso LLC and El Paso Merchant Energy L.P. are indirect subsidiaries of Kinder Morgan, Inc., a publicly held corporation.

ONEOK, Inc. is a publicly held corporation. No parent entity or other publicly held corporation owns 10% or more of its outstanding stock.

ONEOK Energy Services Company, L.P., formerly known as ONEOK Energy Marketing & Trading Company, L.P., is an indirectly wholly owned subsidiary of ONEOK, Inc.

After the underlying lawsuits were filed, Reliant Energy,. Inc. and Reliant Energy Services, Inc. underwent a series of name changes and corporate transactions. Reliant Energy, Inc. changed its name to RRI Energy, Inc. and subsequently merged with Mirant Corp. to become GenOn Energy, Inc.; 100% of its stock is now owned by NRG Energy, Inc. (NYSE:NRG). Reliant Energy Services, Inc. changed its name to RRI Energy Services, Inc. and subsequently changed its form from a corporation to a limited liability company, which is now known as RRI Energy Services, LLC. GenOn Energy, Inc. indirectly owns 100% of the stock of RRI Energy Services, Inc., which is now known as RRI Energy Services, LLC. Only T. Rowe Price owns more than 10% of the shares of NRG Energy, Inc.

The Williams Companies, Inc. is a publicly held Delaware corporation. No publicly held corporation owns more than 10% of its stock.

Williams Merchant Services Company, Inc., now known as Williams Merchant Services Company LLC, is a wholly owned subsidiary of The Williams Companies, Inc., a publicly held Delaware corporation.

Williams Energy Marketing & Trading Company, formerly Williams Gas Marketing, Inc. and now known as WPX Energy Marketing, LLC, is a wholly-owned subsidiary of WPX Energy, Inc.

Williams Power Company, Inc., formerly Williams Gas Marketing, Inc. and now known as WPX Energy Marketing, LLC, is a wholly-owned subsidiary of WPX Energy, Inc. As of December 31, 2011, WPX Energy, Inc. is no longer an affiliate of The Williams Companies, Inc.

e prime, Inc. is an indirect wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Northern States Power Company is a wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Xcel Energy Inc. is a publicly held corporation with no parent or corporate owner.

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IN THE

Supreme Court of the United States

No. 13-

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 715 F.3d 716. Pet. App. 1a. The District Court's July 18, 2011 opinion granting Petitioners summary judgment is unreported but available at 2011 WL 2912910. *Id.* at 64a. Its November 2, 2009 opinion regarding preemption is unreported. *Id.* at 124a.

JURISDICTION

The Ninth Circuit entered judgment on April 10, 2013. On June 20, 2013, Justice Kennedy extended the time to petition for certiorari to and including

Saturday, August 24, 2013, making the petition due on Monday, August 26, 2013 under Rule 30.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides in relevant part:

> [T]his chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption * * * , and to natural-gas companies engaged in such transportation or sale * * * , but shall not apply to any other transportation or sale of natural gas[.]

Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a), provides in relevant part:

> Whenever the Commission * * * shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order[.]

INTRODUCTION

This case presents a question of exceptional importance on which the Ninth Circuit and two state supreme courts are squarely in conflict: Under what circumstances does the Natural Gas Act ("NGA")

preempt lawsuits aimed at regulating the practices of natural gas companies?

The NGA, 15 U.S.C. § 717 *et seq.*, gives the federal government exclusive power to regulate the wholesale natural gas market and the practices of natural gas companies affecting wholesale gas rates. Recognizing the NGA's broad field-preemptive scope, this Court has held time and again that states cannot regulate the wholesale gas market through the back door: No matter the putative subject of a state regulation, it is preempted if its effects are "directed at * * * things over which [the NGA] has comprehensive authority." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). Thus, for example, although states generally have the power to regulate the issuance of gas companies' securities, the NGA preempts such regulations where they would directly affect wholesale gas rates. *Id.* at 307-09. The Court has strictly policed state regulations like these to ensure that states do not destroy "the uniformity of regulation which was an objective of the Natural Gas Act." *Id.* at 310.

The Ninth Circuit in the decision below broke with this Court's teachings—and created a recipe for regulatory chaos—by authorizing every state to impose its own unique regulatory regime on the wholesale gas market.

Respondents are commercial and industrial end users of natural gas. They sued Petitioners, who are natural gas companies subject to federal regulation, on state-law antitrust theories. Respondents alleged that Petitioners had engaged in practices that inflated so-called "index" rates for natural gas—that is, published rate compilations, reported by several industry publications, that natural gas buyers and

sellers often use to set the price term for natural gas contracts in both the wholesale and retail gas markets. Respondents alleged that Petitioners' index-rate manipulation drove up prices in the wholesale and retail gas markets and that Respondents paid higher retail prices as a result.

Petitioners argued, and the District Court held, that those state-law antitrust claims were preempted because, by Respondents' own admission, the claims were "directed at" practices that affected wholesale gas prices—an area the NGA's plain text commits to federal control. *Schneidewind*, 485 U.S. at 308; 15 U.S.C. § 717d(a). The Ninth Circuit rejected the District Court's approach. It held that what matters for preemption purposes is not whether the lawsuit would have the effect of regulating in the federal field, but instead the type of *transaction* in which the plaintiff allegedly sustained injury. The Ninth Circuit held that because Respondents suffered harm in retail transactions, and the NGA does not regulate retail sales, there could be no preemption. That was so even though Respondents' lawsuits would regulate a subject matter—practices affecting the wholesale market—that is within the federal field.

That holding is irreconcilable with *Schneidewind* and this Court's other NGA preemption decisions. It creates a split of authority with the Supreme Courts of Tennessee and Nevada, which have rejected the Ninth Circuit's analysis and held that state-law antitrust suits arising out of the same conduct are preempted. And it is worthy of review because it threatens to wreak havoc on the Federal Energy Regulatory Commission's oversight of the nation's energy market. Under the Ninth Circuit's approach, if a natural gas wholesaler engages in a practice that

happens to affect both wholesale and retail rates, that practice is subject to regulation by lawsuits in every state. Natural gas companies will have to try to conform their conduct to 50 different sets of state laws. Worse, companies—and FERC itself—will not know whether some or all states will end up competing with FERC to regulate a given practice, because they will have no way to predict whether, or where, that practice might end up affecting retail rates.

That is untenable. As the Tennessee Supreme Court wrote in rejecting the Ninth Circuit's approach, "[t]he application of * * * state[ ] antitrust law to the circumstances here would undermine two essential purposes of the federal legislation: uniformity and freedom from government interference." *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 871 (Tenn. 2010). This Court should grant the petition for certiorari and reverse.

STATEMENT

A. Statutory and Regulatory Background

1. 2013 marks the 75th anniversary of federal regulation of the interstate natural gas market. Before that time, this Court held that each state's authority over natural gas transactions ended at the state line. *See, e.g., Pub. Util. Comm'n of R.I.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927). Seeking to fill the regulatory gap created by those decisions, Congress enacted the NGA in 1938. *See Fed. Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 609-610 (1944).

Section 1(b) of the NGA established federal control over "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale for ultimate public consump-

tion for * * * any * * * use," and "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b). In other words, it established federal control over a class of natural gas *sales*—wholesale transactions—and a class of natural gas *companies*—those engaged in such sales and in interstate gas transport. *Id.* In industry parlance, such sales are called "jurisdictional sales" and such companies are called "jurisdictional sellers." Pet. App. 16a, 22a. At the same time, Section 1(b) preserved the states' role in regulating local activities by providing that the NGA "shall not apply to any other transportation or sale of natural gas * * * or to the production or gathering of natural gas." *Id.* Sales not subject to federal control—including retail sales—are known as "non-jurisdictional sales."

The NGA empowers FERC to ensure that rates for jurisdictional sales are "just and reasonable." 15 U.S.C. § 717c. To carry out that mandate, NGA Section 5 empowers FERC to regulate jurisdictional sellers with respect to "any rule, regulation, practice, or contract * * * affecting" a "rate * * * subject to the jurisdiction of the Commission." *Id.* § 717d(a).

This Court has long held that the NGA occupies the field as to matters within its scope. *Hope*, 320 U.S. at 609-610. The statute "leaves no room either for direct state regulation" in the field "or for state regulations which would indirectly achieve the same result." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 91 (1963). Thus—as discussed further *infra* at 17-21—this Court has held that even state regulations nominally involving some topic outside the NGA's affirmative reach are preempted by the NGA if their regulatory effects are "aimed directly at" jurisdictional sellers, *Transcontinental*

Pipe Line Corp. v. *State Oil & Gas Bd.*, 474 U.S. 409, 419 (1986) ("*Transcon*") (citation omitted), or "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308.

2. Starting in the 1970s, Congress deregulated parts of the industry through the Natural Gas Policy Act, Pub. L. No. 96-621, 92 Stat. 3350 (1978), Wellhead Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989), and other statutes. These statutes removed from FERC's jurisdiction certain portions of the market, including "first sales," which are "sales of natural gas that are not preceded by a sale to a * * * pipeline, local distribution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007). Consistent with Congress's increasingly market-based approach, FERC in 1992 began issuing "blanket certificates" to interstate pipelines and marketers to sell wholesale natural gas at market rates. *See* 57 Fed. Reg. 57,952 (Dec. 8, 1992). FERC emphasized, however, that it would continue to "monitor the operation of the market through the complaint process" and take steps to combat market abuses. *Id.* at 59,958.

This Court has confirmed that these deregulatory efforts did not diminish the NGA's field-preemptive scope. In *Transcon*, the Court rejected a state's argument that the state had jurisdiction to regulate first sales. The Court explained that Congress's "decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." 474 U.S. at 423.

B. The Decisions Below.

1. This case stems from events between 2000 and 2002. At that time, two trade publications, *Gas Daily* and *Inside FERC*, collected information on the

prices at which market participants were buying and selling gas. Pet. App. 14a. The publications compiled these price reports into indices. Many natural gas contracts, in turn, incorporated the "index" prices as the contractual pricing term. *Id.*

Respondents' lawsuits alleged that Petitioners engaged in practices that inflated these "index" prices. Specifically, Respondents alleged that Petitioners reported fictional trades and engaged in "wash sales"[2] that created the impression of heightened demand for gas and improperly raised the index prices reported by *Gas Daily* and *Inside FERC*. Pet. App. 15a. As a result, Respondents allegedly paid higher prices because they bought gas in retail transactions with price terms pegged to the index. *Id.* at 14a-15a. They filed suit in various states on state-law antitrust theories. The Panel on Multidistrict Litigation consolidated the suits in the District of Nevada. *Id.* at 12a. Other suits challenging the same conduct were not amenable to federal jurisdiction and continued on parallel tracks in state court. *See, e.g., Leggett*, 308 S.W.3d 849.

2. Petitioners moved for summary judgment in the multidistrict litigation, arguing that Respondents' state-law claims were barred by NGA field preemption. The argument was based on an undisputed fact: Although Petitioners' alleged practices supposedly increased the price Respondents paid for natural gas at retail, Respondents conceded that the same alleged practices also necessarily increased the

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[2] A "wash sale" is a "prearranged sale[ ] in which traders agree[ ] to execute a buy or sell * * * and then immediately reverse or offset the first trade by bilaterally executing * * * an equal or opposite buy or sell." Pet. App. 15a (citation omitted).

price for *wholesale* gas subject to FERC's jurisdiction. Pet. App. 110a-111a; Resp. CA9 Opening Br. 11-12. That was so because wholesale transactions, like retail transactions, routinely used published index prices as their contractual price term. Pet. App. 111a; ER1341-43, 1367-70. To the extent alleged false reports or wash sales drove up a published index price, those practices would have affected both wholesale and retail transactions priced with reference to that index in exactly the same way. Pet. App. 111a. Respondents' attempt to impose state-law regulation through lawsuits thus was directed at a subject matter the NGA's plain text places within the federal field—namely, "practice[s] * * * affecting" wholesale gas rates. 15 U.S.C. § 717d(a).

And it was clear that FERC had authority over the practices at issue. In 2003, pursuant to its pre-existing authority under the NGA, FERC amended its blanket certificates to promulgate a "Code of Conduct" for jurisdictional sellers, forbidding them from engaging in the precise practices Respondents challenge in these state-law antitrust cases. 68 Fed. Reg. 66,323, ¶¶ 5, 21-22, 53, 65, 70, 84 (Nov. 26, 2003). FERC explained that it was using its authority over jurisdictional sellers like Petitioners to forbid false reports and wash sales and "maintain and protect the competitive marketplace" for the "sales over which it [has] jurisdiction." *Id.* at ¶ 23.

The District Court agreed with Petitioners' contentions and granted them summary judgment. Pet. App. 64a. The court found that Petitioners' alleged index-manipulation practices would have directly affected jurisdictional rates. *Id.* at 110a-111a. It accordingly concluded that those practices were subject to FERC's jurisdiction and that Respondents'

antitrust claims—which attempted to regulate the same practices through state law—were preempted. *Id.* at 75a. The District Court explained: "Although FERC had no jurisdiction over [Respondents'] non-jurisdictional transactions," the agency "does have exclusive jurisdiction over any practice by a jurisdictional seller that directly affects a jurisdictional rate." *Id.* And "[b]ecause FERC's jurisdiction is exclusive where it exists, any state law claims based on any such practices are preempted." *Id.*

3. Respondents appealed to the Ninth Circuit. They relied heavily on that court's opinion in *Gallo*, *supra*, which also involved allegations that a jurisdictional seller drove up index prices through false reports and wash sales. Respondents asserted that *Gallo* established a "transaction-based approach to the preemption analysis." Resp. CA9 Opening Br. 43. Under *Gallo*, they argued, the fact that the *transactions* in which they bought gas were non-jurisdictional meant the NGA did not preempt their claims. *Id.* at 46.

The Ninth Circuit agreed. Although the *Gallo* decision principally addressed the filed-rate doctrine, *see* 503 F.3d at 1039-46, the panel in this case held that *Gallo*'s brief discussion of field preemption was controlling. It explained that "[t]he claims in *Gallo* were essentially the same as [Respondents'] claims." Pet. App. 25a. In *Gallo*, as here, the plaintiff's claims included state-law antitrust causes of action. *Id.* at 26a. And in *Gallo*, as here, the jurisdictional seller argued that field preemption barred those claims. *Id.* *Gallo* had rejected that argument, the Ninth Circuit explained, because the indices on which the plaintiffs based their claims included some reports of non-jurisdictional first sales. *Id.* The panel conclud-

ed that the "reasoning in *Gallo* applies with equal force to the question presented by this case." *Id.* at 28a. It held that because Respondents bought their natural gas in non-jurisdictional retail sales, their claims were not preempted. *Id.*

The Ninth Circuit rejected the District Court's holding that FERC had exclusive jurisdiction because the alleged index-manipulation practices affected jurisdictional rates. Pet. App. 28a. As the panel saw things, Section 5 of the NGA, which gives FERC jurisdiction over practices affecting jurisdictional rates, had to be "read * * * narrowly" to preserve states' authority over non-jurisdictional sales. *Id.* at 29a. In other words, although the panel acknowledged that FERC has plenary authority over jurisdictional sellers' practices affecting jurisdictional rates, the court concluded that that plenary authority evaporates if the practices happen to also affect non-jurisdictional rates. *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

Recognizing the "importance of the * * * functioning of the interstate market in natural gas," this Court frequently has granted certiorari to review state regulation that threatens to interfere with that market. *E.g.*, *Transcon*, 474 U.S. at 411; *Schneidewind*, 485 U.S. at 408; *Northern Natural*, 372 U.S. at 91. The Court should do so again here. The Ninth Circuit's decision meets every criterion for review. It "conflicts with a decision by a state court of last resort"—indeed, two state courts of last resort—on "an important federal question." S. Ct. R. 10(a). It is irreconcilable with this Court's decisions. And the subject matter is of considerable importance: The Ninth Circuit's ruling "disturbs the uniformity of the

federal scheme," and could "seriously impair [FERC's] authority to regulate" jurisdictional sellers, because those sellers "will be forced to comply with varied state regulations of their * * * practices." *Transcon*, 474 U.S. at 420, 423 (citation omitted). That is the very danger the NGA was designed to prevent. The writ should be granted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE TENNESSEE AND NEVADA SUPREME COURTS.

The decision below splits with decisions of the Tennessee and Nevada Supreme Courts arising out of the very same underlying facts. The Ninth Circuit held that the NGA does not preempt a state-law claim that regulates the wholesale market if the plaintiff's particular gas purchase happened to be at retail. The Tennessee and Nevada courts, by contrast, hold that the NGA *does* preempt a state-law claim that regulates the wholesale market regardless of whether the plaintiff purchased at retail. That is a fundamental disagreement about how preemption works. This Court should resolve it.

1. In *Leggett*, the Tennessee Supreme Court faced a case materially identical to this one—indeed, *Leggett* was actually part of this multidistrict litigation before it was remanded to state court for failure to satisfy the amount-in-controversy requirement, and the defendants in *Leggett* are also Petitioners here. *See Leggett*, 308 S.W.3d at 848-49; Dist. Ct. Dkt. No. 338 (May 2, 2006). Just as here, the plaintiffs in *Leggett* were retail purchasers who sued the defendants under state antitrust theories for allegedly manipulating published index prices through wash trades and false price reports. *Id.* at 848, 850. Just as here, the defendants in *Leggett* argued that

plaintiffs' claims were field-preempted because "the conduct at issue occurred in the wholesale market." *Id.* at 850. And the plaintiffs in *Leggett* responded by advancing the same arguments the Ninth Circuit adopted in *Gallo* and this case—that the claims were not preempted because the index contained a mix of jurisdictional and non-jurisdictional transactions, and because plaintiffs bought gas in retail transactions. *Id.* at 865, 872.

The Tennessee Supreme Court squarely rejected plaintiffs' arguments. First, as for *Gallo*: The court conceded that plaintiffs would prevail "[i]f [it] were bound to follow" *Gallo*, but it "decline[d] to adopt the rationale of the Ninth Circuit * * * as to [its] determination that field pre-emption did not preclude a state action." *Id.* at 871-872. Instead, the Tennessee court focused on the impact of state antitrust lawsuits on the federal regulatory scheme for interstate natural gas, *id.*, and concluded that "[t]he application of our state's antitrust law to the circumstances here would undermine two essential purposes of the federal legislation: uniformity and freedom from government interference." *Id.*

The Tennessee Supreme Court then rejected the argument the Ninth Circuit accepted in this case: that the plaintiffs' "claims are not pre-empted because they are based on consumer transactions, rather than" on jurisdictional sales. *Compare id.* at 872, *with* Pet. App. 24a. The *Leggett* court "simply disagree[d]" that it mattered for purposes of field preemption that plaintiffs' alleged damages resulted from retail purchases. 308 S.W.3d at 872. It explained that though plaintiffs were retail purchasers, they were "ultimately challenging wholesale prices," and "[t]heir claims, therefore, necessarily intrude

upon the federal domain, even if the transactions to which they were direct parties fell outside the scope of the NGA. Such claims are preempted." *Id.*

The decisions of the Tennessee Supreme Court and the Ninth Circuit cannot be reconciled. In one court, a lawsuit based on a retail transaction that has the effect of regulating in the federal field is preempted by the NGA; in the other, it is not. And that split is outcome-determinative. In the Tennessee Supreme Court, the plaintiffs' lawsuits have been dismissed, and in the Ninth Circuit they have not. That is "a real or 'intolerable' conflict on the same matter of law or fact" of the sort this Court regularly grants certiorari to resolve. E. Gressman *et al.*, *Supreme Court Practice* 241 (9th ed. 2007).

2. The problem is even worse in Nevada, where the Ninth Circuit's opinion conflicts with the Nevada Supreme Court's decision in *Nevada ex rel. Johnson* v. *Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013). Because Nevada sits within the Ninth Circuit, lawsuits like those at issue here will be preempted if they are filed and remain in Nevada state court, but will be allowed to proceed if they are adjudicated in Nevada federal court. That absurdity should not be allowed to stand.

In *Johnson*, like in this case and *Leggett*, the plaintiff purchasers of natural gas alleged that a jurisdictional seller had inflated index prices through anticompetitive trading practices. *Id.* at 1188. The defendants, one of whom is a Petitioner here, argued that plaintiffs' claims were preempted by the NGA. *Id.* And the Nevada Supreme Court agreed: It reviewed *Gallo* and *Leggett*, observed that the Ninth Circuit and the Tennessee high court had reached

"vastly different results" on the same facts, and then cast its lot with the Tennessee court. *Id.* at 1192. The *Johnson* court explained that it "c[ould not] agree" with the Ninth Circuit's foundational premise that state antitrust law can "coexist peacefully with natural gas federal regulations" regarding the same misconduct. *Id.* at 1193. On the contrary, it agreed with *Leggett*'s conclusion that the absence of preemption would lead to "the imposition on interstate natural gas wholesalers [of] 50 different sets of state rules concerning anticompetitive behavior." Such rules, in turn, would result in "a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Id.* *Johnson* thus concluded that Nevada's antitrust statute "improperly encroache[d] on the field" and was preempted. *Id.*

The different outcomes in *Leggett* and *Johnson* on the one hand, and the decision below on the other, create a clear and acknowledged split. Under the decision below, whether a claim is preempted turns on whether the plaintiff's injury occurred in a jurisdictional transaction. But under *Leggett* and *Johnson*, whether the injury occurred in a jurisdictional transaction is irrelevant. Instead, those courts ask the far more sensible question: Would the state lawsuits regulate activity within the wholesale market? *Leggett*, 308 S.W.3d at 868-872; *Johnson*, 289 P.3d at 1192-93. That is the analysis commanded by this Court's precedent, as we discuss below. This Court should accept review and conclusively resolve whether state antitrust claims aimed at practices within the federal field are preempted.

3. Finally, the deep disagreement among these courts also extends to the foundational question

whether a presumption against preemption applies. The Ninth Circuit applied the presumption and characterized it as carrying "particular force in light of Congress's deliberate efforts to preserve traditional areas of state regulation" of natural gas. Pet. App. 24a-25a (citing *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009)). The Tennessee court, in contrast, observed that the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence,'" as there has been with respect to natural gas. *Leggett*, 308 S.W.3d at 866 (quoting *United States* v. *Locke*, 529 U.S. 89, 108, 120 (2000)). More generally, the circuits have adopted inconsistent approaches to the presumption when a state law implicates both an exercise of state police powers and a history of federal involvement. *Compare Pacific Merch. Shipping Ass'n* v. *Goldstene*, 639 F.3d 1154, 1166-67 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 22 (2012) (applying presumption in this context), *and Farina* v. *Nokia Inc.*, 625 F.3d 97, 116 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 365 (2011) (same), *with Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (declining to apply presumption to a "dual * * * system" of federal and state regulation), *and Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 608 (5th Cir. 2000) (declining to apply presumption because a state law aimed at health and safety "implicate[d] federal concerns at least as much as state concerns"), *rev'd on other grounds by*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002). This recurring conflict merits this Court's review and provides an additional reason to grant the petition.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

This case separately warrants review because it involves an "important federal question," and the Ninth Circuit's resolution of that question "conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

1. It is black-letter law that through the NGA "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 305. The NGA thus forbids both "direct state regulation" of jurisdictional sales and "state regulations which would indirectly achieve the same result." *Northern Natural*, 372 U.S. at 91. Applying that standard, this Court repeatedly has held that state regulation is preempted, regardless of its nominal subject area, if it is "directed at * * * things over which [the NGA] has comprehensive authority." *Schneidewind*, 485 U.S. at 308; *accord, e.g.*, *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 372 (1988);[3] *Transcon*, 474 U.S. at 419; *Northern Natural*, 372 U.S. at 90.

a. In *Schneidewind*, for example, the Court held that the NGA preempted a Michigan statute requiring companies that transported natural gas in-state to obtain state approval before issuing securities. 485 U.S. at 298. The Court acknowledged that the NGA did not expressly authorize FERC to regulate

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[3] *Mississippi Power* was a Federal Power Act ("FPA") preemption case. "[T]he relevant provisions of [the FPA and the NGA] are in all material respects substantially identical," and this Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (quotation marks & citation omitted).

the issuance of securities. *Id.* But that was not the end of the preemption analysis. Instead, the Court held that the Michigan law was preempted because it "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. "By keeping a natural gas company from raising its equity levels above a certain point," the Court reasoned, "Michigan s[ought] to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' That is regulation of rates." *Id.* at 308. Moreover, to the extent the Michigan law was aimed at natural-gas companies "that threaten the continued supply of gas by seeking to finance their operations through excessive debt," that too intruded on FERC's domain because FERC has the "authority to regulate and fix practices affecting rates," and that authority "allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments." *Id.* at 309; *see also id.* at 304 ("FERC has the authority to examine and to change 'any rule, regulation, practice, or contract affecting [rates that] is unjust, unreasonable, unduly discriminatory, or preferential.' ") (quoting 15 U.S.C. § 717d(a)). That the Michigan law nominally regulated a company's capital structure was irrelevant. *Id.* at 309.

Schneidewind construed the same statutory provision, 15 U.S.C. § 717d, at issue in this case. And its key point applies squarely here: The nominal subject of a state regulation is irrelevant; instead, a regulation is preempted when its effects are "directed at" areas "over which FERC has comprehensive authority." *Id.* at 308.

The Ninth Circuit's holding flies in the face of that simple teaching. The panel believed that Respond-

ents' state-law claims nominally relate to a subject matter—retail transactions—over which the NGA exercises no authority. Pet. App. 24a. But like in *Schneidewind*, that is neither here nor there; the relevant consideration is that Respondents' attempted regulation-by-lawsuit is "directed at" an area "over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308.[4] Indeed, the entire point of Respondents' claims is to regulate alleged practices that Respondents admit would affect jurisdictional rates. *See* Resp. CA9 Opening Br. 11-12. And the NGA by its terms has given authority over such "practice[s] * * * affecting" jurisdictional rates exclusively to FERC. 15 U.S.C. § 717d(a); *see Mississippi Power*, 487 U.S. at 371, 374 (FERC has exclusive authority not just over wholesale rates, but over agreements and other matters "that affect wholesale rates").

FERC clearly understands that it has that authority: The agency exercised it in 2003, outlawing the very transaction-reporting and wash-trading practices that form the basis of Respondents' suits. *See supra* at 9. And the District Court did not hesitate to conclude that FERC had the power to do so. It observed that FERC's authority "is demonstrated not only by FERC's actual exercise thereof in relation to these practices, but by the fact that the Court would have little trouble rejecting a challenge to FERC's

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[4] It is no answer to say Respondents' claims are not regulation imposed by state legislative enactment. Respondents' antitrust claims aim to impose legal liability on Petitioners for their activities. They thus constitute state regulation, subject to preemption analysis like any other state regulatory action. *See, e.g., Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 325 (2008); *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1265 (2012).

jurisdiction to prohibit jurisdictional sellers from engaging in false price reporting [and] wash trades * * * that affected the price mechanism by which jurisdictional rates are set." Pet. App. 111a. Yet the Ninth Circuit now lets states regulate the same practices. That approach stands this Court's preemption jurisprudence on its head. As Justice Scalia has observed, "it is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Mississippi Power*, 487 U.S. at 377 (Scalia, J., concurring in the judgment).

b. This Court's decision in *Mississippi Power* likewise demonstrates that the Ninth Circuit erred. *Mississippi Power* held that an agreement between four power companies allocating power from a nuclear plant was a "contract affecting the wholesale rates of those * * * companies." 487 U.S. at 360 n.6. It therefore held that Mississippi could not regulate that contract through its power to set retail rates. *Id.* at 374. The reason was straightforward: "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to * * * insure that agreements affecting wholesale rates are reasonable." *Id.* And that was true even though Mississippi was purporting to exercise its regulatory authority over the *retail* market. *Id.*

Mississippi Power's preemption analysis applies with the same force in this case. Just as FERC had exclusive jurisdiction over contracts affecting wholesale rates in *Mississippi Power*, so too does it have exclusive jurisdiction over practices affecting whole-

sale rates here—both subjects are assigned to FERC by the same NGA provision, 15 U.S.C. § 717d(a). As a consequence, "[s]tates may not regulate in [the] area[]" even if they do it through their authority over the retail market. *Mississippi Power*, 487 U.S. at 374. But that is precisely what Respondents' state-law antitrust suits would do here.

The Ninth Circuit panel in this case rejected Petitioners' reliance on *Mississippi Power*, but its reasoning only underscores the degree to which it went astray. It wrote that Petitioners' analogy to *Mississippi Power* "cannot be squared with the *Gallo* court's holding that the NGA does not preempt state antitrust challenges to rates and practices associated with * * * nonjurisdictional sales." Pet. App. 36a. The panel asserted, in effect, that a *Ninth Circuit decision* somehow trumps a decision of *this Court*. That reasoning gets vertical *stare decisis* backwards. *Mississippi Power* compels rejection of the Ninth Circuit's holding, and nothing in the annals of Ninth Circuit case law can change that fact.

2. This Court's recent decision in *Kurns* v. *Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), further illuminates the Ninth Circuit' error. In *Kurns*, plaintiffs brought common-law defective-design and duty-to-warn claims against railroad product manufacturers, alleging that the products caused them physical injury. *Id.* at 1265-66. The manufacturers argued that those claims were preempted by the Locomotive Inspection Act ("LIA"), which provides that rail carriers may use cars on their railroad lines only when all of the cars' parts "are in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701. The plaintiffs responded by advancing an

argument akin to the one the Ninth Circuit adopted here: They argued that the LIA did not preempt their claims "because the claims arise out of the repair and maintenance of locomotives," and federal regulatory authority under the LIA did not extend to the regulation of hazards arising from repair or maintenance; instead, it covered only "use of locomotives on a railroad line." 132 S. Ct. at 1267.

The Court rejected that argument in short order. It explained that Congress manifested an intent in the LIA to " 'occupy the entire field of regulating locomotive equipment' and * * * did not distinguish between hazards arising from repair and maintenance as opposed to those arising from use on the line." *Id.* at 1267-68 (citation omitted). Because the plaintiffs' suit was "*aimed at the equipment of locomotives*"—the " 'same subject as' " the Act—the fact that the plaintiff's injuries arose from the allegedly improper maintenance and repair of the locomotive rather than its use on the line was irrelevant. *Id.* at 1268 (citation omitted; emphasis added).

The argument this Court rejected in *Kurns* is indistinguishable from the one the Ninth Circuit has now embraced. Although the Ninth Circuit believed Respondents' suits "aris[e] out of" Respondents' retail transactions, Pet. App. 28a, that is irrelevant. Rather, the question under *Kurns* is whether Respondents' claims are "aimed at" regulating something that a federal statute commits to exclusive federal jurisdiction. 132 S. Ct. at 1268; *see also Medco Energi U.S., LLC* v. *Sea Robin Pipeline Co.*, 895 F. Supp. 2d 794, 806-811 (W.D. La. 2012) (applying *Kurns* to analyze field preemption under the NGA), *aff'd*, ___ F. App'x ___, 2013 WL 3316635 (5th Cir. July 2, 2013). In this case, Respondents' claims

are aimed at practices affecting jurisdictional rates, and Section 5 of the NGA places practices affecting jurisdictional rates within exclusive federal control. That is the end of the matter; the context in which the suits "arose" is of no moment.

In short, the application of state antitrust law to Petitioners' purported practices "amounts to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Schneidewind*, 485 U.S. at 304. The Ninth Circuit accordingly should have held that Respondents' suits are preempted. Because Petitioners' alleged index manipulation practices are subject to FERC's control, the states cannot regulate them.

3. The Ninth Circuit's contrary conclusion relied on the following syllogism: Respondents suffered their alleged injuries in retail gas transactions; states have authority to regulate retail gas transactions; therefore, Respondents can use state law to sue for relief. Pet. App. 24a, 28a. But that thinking misses the point of this Court's precedents: It is the *effect* of a state regulation, not the context from which it sprang, that determines preemption.

In several NGA (and FPA) preemption cases, states have made the very same argument the Ninth Circuit accepted here, asserting that they were nominally regulating something within state authority. In *Mississippi Power*, much like here, that "something" was the prudence of "an increase in [the power company's] retail rates." 487 U.S. at 356. In *Northern Natural*, it was the "production and gathering" of natural gas. 372 U.S. at 90. In *Schneidewind*, it was the issuance of securities. 485 U.S. at 298. And yet in each case, this Court concluded that the state regulation was preempted because its effects were

"directed at * * * things over which [the NGA] has comprehensive authority." *Id.* at 308; *accord Northern Natural*, 372 U.S. at 94 (state regulation preempted because it was "aimed directly at interstate purchasers and wholesales for resale"); *Mississippi Power*, 487 U.S. at 374 (state regulation preempted because it was directed at "agreements that affect wholesale rates"). So too here. The Ninth Circuit's logic does not take this case outside the scope of *Schneidewind* and its predecessors. Its decision is contrary to this Court's precedent.

III. THE NINTH CIRCUIT'S DECISION WOULD FRAGMENT REGULATION OF THE INTERSTATE NATURAL GAS MARKET.

Finally, the question presented is tremendously important to the natural gas industry (and the electric power industry, whose governing statute is identical, *see supra* at 17 n.3). Many billions of dollars are allegedly at stake in this litigation. *See, e.g.*, Dist. Ct. Dkt. No. 1846 at 3, 58-59 (Nov. 3, 2009) (alleging $1.75 to $3.5 billion in damages in one state in a single year). But the significance of the Ninth Circuit's aberrant legal rule goes much farther than this case. The panel's notion of shared jurisdiction over contracts or practices that have the same effect on wholesale and retail markets would severely undercut the "uniformity of the federal scheme" that this Court has identified as a prime objective of the Natural Gas Act. *Transcon*, 474 U.S. at 423. Under the Ninth Circuit's rule, jurisdictional sellers will have to monitor the antitrust laws (and other consumer protection laws) of 50 states, and conform their practices affecting jurisdictional rates to the rules imposed by the most restrictive states, or risk exposure to massive damages. Moreover, no one—

not industry actors nor even FERC itself—will know until long after the fact what jurisdictions might regulate a particular practice. That is intolerable. This Court should grant review to restore the uniformity of regulation contemplated by the NGA.

1. Under the Ninth Circuit's test, jurisdictional sellers will be unable to determine *a priori* who will regulate any particular practice in the wholesale market. If, by happenstance, a practice affects only customers who buy natural gas in jurisdictional sales, then presumably FERC will be the lone regulator. However, if retail buyers (or the plaintiffs' bar on their behalf) can make a case that the practice affects them, too, then FERC's exclusive control is out the window. Suddenly, every state in which such a retail buyer resides can throw its hat into the regulatory ring. Gas companies thus would be exposed to massive liability for practices that are uniform nationwide, and that may well meet the approval of FERC and many states, but that do not pass muster under the idiosyncratic antitrust laws applied in a few state courts.

The whole point of the NGA is to guard against this fragmentation of natural-gas regulation. Congress charged FERC "to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." *Northern Natural*, 372 U.S. at 91-92. State regulation thus "runs afoul" of the NGA when it "disturbs the uniformity of the federal scheme" and forces jurisdictional actors "*to comply with varied state regulations of their * * * practices.*" *Transcon*, 474 U.S. at 423 (emphasis added). That is just what would happen under the Ninth Circuit's rule. Indeed, it could well

happen in this very case: If the Ninth Circuit's judgment stands, the cases will be remanded for trial in various district courts under divergent rules of state law. *See Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (MDL courts must send cases back to transferor courts for trial). Respondents' claims seeking to regulate Petitioners' practices could end up succeeding under some state's antitrust laws and not others. The result would be a jumble of inconsistent rulings on whether a particular practice is proper.

The Ninth Circuit's rule, in short, forces jurisdictional sellers to obey state law first and FERC second, and creates the real threat of conflicting regulation. Those results fly in the face of the NGA's design. We can put it no better than the Nevada high court did:

> [T]he conclusion that there is no preemption leads to the imposition on interstate natural gas wholesalers [of] 50 different sets of state rules concerning anticompetitive behavior. [That] * * * would devastate two of the * * * purposes of the federal statutory scheme: national uniformity and freedom from burdensome government intervention. From a practical standpoint, if each state intervened in this field with different regulations, the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market. [*Johnson*, 289 P.3d at 1193 (quotation marks & citation omitted)].

2. The Ninth Circuit downplayed these concerns, asserting that "[s]tate and federal antitrust laws complement" the NGA "because such laws support fair competition." Pet. App. 27a. That is the wrong analysis as a matter of law; "[w]here Congress occu-

pies an entire field * * * even complementary state regulation is impermissible." *Arizona* v. *United States*, 132 S. Ct. 2492, 2502 (2012). But the Ninth Circuit's assertion also ignores the way state regulations operate in practice. States inevitably will disagree about what practices are "anticompetitive." As the Tennessee Supreme Court explained, there is no Platonic ideal of a competitive market that all antitrust laws strive to protect; on the contrary, "there is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene." *Leggett*, 308 S.W.3d at 869. What one state might deem a legitimate business transaction, another might deem a manipulative wash sale. What one state might deem a legitimate way of reporting transactions to the trade press, another might view as deceptive. *See id.* To say state antitrust regimes would "complement" the uniform federal scheme is to ignore the differences from one state to the next.

Moreover, different state laws also punish purportedly anticompetitive conduct in markedly different ways—different both from each other and from federal law. For instance, Kansas, Wisconsin, and Colorado allow antitrust plaintiffs in certain circumstances to collect the *full* price they paid for a good as damages, not just treble the amount the defendant supposedly overcharged for the product. *See* Kan. Stat. Ann. § 50-115 (2011); Wis. Stat. Ann. § 133.14; Colo. Rev. Stat. § 6-4-121. That is a far greater measure of damages than a plaintiff can obtain under federal law. *See Kansas* v. *UtiliCorp United, Inc.*, 497 U.S. 199, 206 (1990) (Clayton Act damages limited to treble amount direct purchaser was overcharged plus costs and attorney fees). Other states

have still different rules. *See, e.g.*, Minn. Stat. § 325D.57 (limiting damages to treble amount of overcharge plus costs and attorney fees, but allowing indirect purchasers to collect damages). This is just one example of the larger point: Respondents' state-law suits pose a grave risk of inconsistent regulation of the natural gas market.

In short, even if all state antitrust laws shared the same objectives as their federal counterparts, "[p]ermitting the [s]tate[s] to impose [their] own penalties * * * would conflict with the careful framework Congress adopted." *Arizona*, 132 S. Ct. at 2502. And it would create the potential for significant new, and conflicting, regulation of jurisdictional sellers that would warp the market.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NEAL KUMAR KATYAL*
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Counsel of Record
Counsel for Petitioners

August 2013

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11-16786

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:06-cv-00233-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

LEARJET, INC.;
TOPEKA UNIFIED SCHOOL DISTRICT 501,

Plaintiffs-Appellants,

v.

ONEOK, INC.; ONEOK ENERGY MARKETING & TRADING CO., L.P.; THE WILLIAMS COMPANIES, INC.; WILLIAMS MERCHANT SERVICES COMPANY, INC.; WILLIAMS ENERGY MARKETING & TRADING COMPANY; AMERICAN ELECTRIC POWER COMPANY, INC.; AEP ENERGY SERVICES, INC.; DUKE ENERGY CORPORATION; DUKE ENERGY TRADING AND MARKETING, LLC; DYNEGY MARKETING AND TRADE; EL PASO CORPORATION; EL PASO MERCHANT ENERGY, L.P.; CMS ENERGY CORPORATION; CMS MARKETING SERVICES & TRADING COMPANY; CMS FIELD SERVICES; RELIANT ENERGY, INC.; RELIANT ENERGY SERVICES, INC.;

CORAL ENERGY RESOURCES, L.P.;
XCEL ENERGY, INC.; EPRIME, INC.,

Defendants-Appellees.

No. 11-16798

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:07-cv-00987-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

HEARTLAND REGIONAL MEDICAL CENTER;
PRIME TANNING CORP.;
NORTHWEST MISSOURI STATE UNIVERSITY,

Plaintiffs-Appellants,

v.

ONEOK, INC.; ONEOK ENERGY MARKETING & TRADING CO., L.P.; THE WILLIAMS COMPANIES, INC.; WILLIAMS MERCHANT SERVICES COMPANY, INC.; WILLIAMS ENERGY MARKETING & TRADING COMPANY; AMERICAN ELECTRIC POWER COMPANY, INC.; AEP ENERGY SERVICES, INC.; DUKE ENERGY CORPORATION; DUKE ENERGY TRADING AND MARKETING, LLC; DYNEGY MARKETING AND TRADE; EL PASO CORPORATION; EL PASO MERCHANT ENERGY, L.P.; CMS ENERGY CORPORATION; CMS MARKETING SERVICES & TRADING COMPANY; CMS FIELD SERVICES; RELIANT ENERGY, INC.; RELIANT ENERGY SERVICES, INC.;

CORAL ENERGY RESOURCES, L.P.;
XCEL ENERGY, INC.; EPRIME, INC.,

Defendants-Appellees.

No. 11-16799

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:06-cv-01351-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

BRECKENRIDGE BREWERY OF COLORADO, LLC; BBD ACQUISITION CO.,

Plaintiffs-Appellants,

v.

XCEL ENERGY, INC.; EPRIME, INC.,

Defendants-Appellees.

No. 11-16802

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:07-cv-01331-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

REORGANIZED FLI, INC.,

Plaintiff-Appellant,

v.

ONEOK, INC.; ONEOK ENERGY MARKETING & TRADING CO., L.P.; THE WILLIAMS COMPANIES, INC.; WILLIAMS MERCHANT SERVICES COMPANY, INC.; WILLIAMS ENERGY MARKETING & TRADING COMPANY; AMERICAN ELECTRIC POWER COMPANY, INC.; AEP ENERGY SERVICES, INC.; DUKE ENERGY CORPORATION; DUKE ENERGY TRADING AND MARKETING, LLC; DYNEGY MARKETING AND TRADE; EL PASO CORPORATION; EL PASO MERCHANT ENERGY, L.P.; CMS ENERGY CORPORATION; CMS MARKETING SERVICES & TRADING COMPANY; CMS FIELD SERVICES; RELIANT ENERGY, INC.; RELIANT ENERGY SERVICES, INC.; CORAL ENERGY RESOURCES, L.P.; XCEL ENERGY, INC.; EPRIME, INC.,

Defendants-Appellees.

No. 11-16818

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:06-cv-00282-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

SINCLAIR OIL CORPORATION,

Plaintiff-Appellant,

v.

ONEOK ENERGY SERVICES COMPANY, L.P.,

Defendant-Appellee.

No. 11-16821

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:06-cv-00267-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

SINCLAIR OIL CORPORATION,

Plaintiff-Appellant,

v.

EPRIME, INC.; XCEL ENERGY, INC.,

Defendants-Appellee.

No. 11-16869

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:07-cv-01019-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

ARANDELL CORPORATION; MERRICK'S INC.;
SARGENTO FOODS INC.;
LADISH CO., INC.; CARTHAGE COLLEGE;
BRIGGS & STRATTON CORPORATION,

Plaintiffs-Appellants,

v.

XCEL ENERGY, INC.; NORTHERN STATES POWER COMPANY; EPRIME, INC.; AMERICAN ELECTRIC POWER COMPANY, INC.; AEP ENERGY SERVICES, INC.; ENERGY CORPORATION; CMS FIELD SERVICES; CMS MARKETING SERVICES & TRADING COMPANY; CORAL ENERGY RESOURCES, L.P.; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY TRADING AND MARKETING LLC; DYNEGY ILLINOIS INC.; DMT G.P. L.L.C.; DYNEGY GP INC.; EL PASO CORPORATION; EL PASO MERCHANT ENERGY, L.P.; ONEOK, INC.; ONEOK ENERGY MARKETING & TRADING CO., L.P.; RRI ENERGY, INC., FKA RELIANT ENERGY, INC.; RRI ENERGY SERVICES, INC., FKA RELIANT ENERGY SERVICES, INC.; THE WILLIAMS COMPANIES, INC.; WILLIAMS POWER COMPANY, INC.; WILLIAMS ENERGY MARKETING & TRADING COMPANY; WILLIAMS MERCHANT SERVICES COMPANY, INC.,

Defendants-Appellees.

No. 11-16876

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:07-cv-00915-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

NEWPAGE WISCONSIN SYSTEM, INC.,

Plaintiff-Appellant,

v.

CMS ENERGY CORPORATION; CMS MARKETING SERVICES & TRADING COMPANY; CMS FIELD SERVICES; XCEL ENERGY, INC.; NORTHERN STATES POWER COMPANY; EPRIME, INC.; CORAL ENERGY RESOURCES, L.P.; DUKE ENERGY TRADING AND MARKETING LLC; DYNEGY ILLINOIS INC.; DMT G.P. L.L.C.; DYNEGY GP INC.; DYNEGY MARKETING AND TRADE; EL PASO CORPORATION; EL PASO MERCHANT ENERGY, L.P.; ONEOK, INC.; ONEOK ENERGY MARKETING & TRADING CO., L.P.; RRI ENERGY SERVICES, INC., FKA RELIANT ENERGY SERVICES, INC.; THE WILLIAMS COMPANIES, INC.; WILLIAMS POWER COMPANY, INC.; WILLIAMS ENERGY MARKETING & TRADING COMPANY; WILLIAMS MERCHANT SERVICES COMPANY, INC.,

Defendants-Appellees.

No. 11-16880

D.C. Nos.
2:03-cv-01431-PMP-PAL
2:07-cv-01103-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

ARANDELL CORPORATION;MERRICK'S INC.;
SARGENTO FOODS INC.; LADISH CO., INC.;
CARTHAGE COLLEGE;
BRIGGS & STRATTON CORPORATION,

Plaintiffs-Appellants,

v.

CMS ENERGY CORPORATION;
CMS MARKETING SERVICES & TRADING COMPANY;
CMS FIELD SERVICES,

Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the District of Nevada

Philip M. Pro, District Judge, Presiding

Argued and Submitted

October 19, 2012—San Francisco, California

Filed April 10, 2013

Before: Carlos T. Bea and Paul J. Watford,
Circuit Judges, and
Willliam K. Sessions, District Judge.*

Opinion by Judge Bea

SUMMARY**

Energy Law

The panel reversed in part, and affirmed in part, the district court's orders in cases consolidated into a multidistrict litigation proceeding, and arising out of the energy crisis of 2000-2002.

Plaintiffs, retail buyers of natural gas, alleged that defendants, natural gas traders, manipulated the

* The Honorable William K. Sessions, III, District Judge for the U.S. District Court for the District of Vermont, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

price of natural gas by reporting false information to price indices published by trade publications and engaging in wash sales. The district court entered summary judgment against plaintiffs in most of the cases, finding that state law antitrust claims were preempted by the Natural Gas Act.

The panel held that the Natural Gas Act does not preempt the plaintiffs' state antitrust claims, and reversed the summary judgment entered in favor of the defendants. The panel also held that the 2003 enactment of the Federal Energy Regulatory Commission's Code of Conduct did not affect the panel's conclusion that the Natural Gas Act does not grant FERC jurisdiction over claims arising out of false price reporting and other anticompetitive behavior associated with nonjurisdictional sales. The panel further held that the district court did not abuse its discretion in denying either of the two motions for leave to amend complaints. The panel reversed in part the district court's orders dismissing the AEP defendants from the Wisconsin *Arandell* and Missouri *Heartland* suits, and affirmed all the other orders at issue in these appeals.

COUNSEL

Jennifer Gille Bacon (argued), William E. Quirk, and Gregory M. Bentz, Polsinelli Shughart PC, Kansas City, Missouri, for Appellants Learjet, Inc., et al., Heartland Regional Medical Center, et al., Breckenridge Brewery of Colorado, LLC, et al., Reorganized FLI, Inc., and Sinclair Oil Corporation.

Robert L. Gegios, Alexander T. Pendleton, and William E. Fischer, Kohner, Mann & Kailas, S.C., Milwaukee, Wisconsin, for Wisconsin Plaintiffs-Appellants.

Mark E. Haddad (argued), Michelle B. Goodman, and Nitin Reddy, Sidley Austin LLP, Los Angeles, California, for Defendants-Appellees CMS Energy Corp., CMS Energy Resources Management Co., and Cantera Gas Company.

Michael J. Kass and Douglas R. Tribble, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, California, for Defendants-Appellees Dynegy Marketing & Trade, Dynegy Illinois, Inc., DMT G.P. L.L.C., and Dynegy GP Inc.

Joshua D. Lichtman, Fulbright & Jaworski L.L.P., Los Angeles, California, and Roxanna A. Manuel, Quinn Emanuel Urquhart & Sullivan, LLP, for Defendant-Appellee Coral Energy Resources, L.P.

Joel B. Kleinman, Adam Proujanski, and Lisa M. Kaas, Dickstein Shapiro LLP, Washington, D.C., for Defendants-Appellees Duke Energy Trading and Marketing, L.L.C. and Duke Energy Carolinas, LLC.

Robert B. Wolinsky, Hogan Lovells US LLP, Washington, D.C., and Steven J. Routh, Orrick, Herrington & Sutcliffe, L.L.P., Washington, D.C., for Defendants-Appellees American Electric Power Company, Inc. and AEP Energy Services, Inc.

Brent A. Benoit and Stacy Williams, Locke Lord Bissell & Liddell LLP, Houston, Texas, for Defendants-Appellees El Paso Corporation, El Paso Merchant Energy, L.P., and El Paso Marketing, L.P.

Amelia A. Fogleman, Oliver S. Howard, and Craig A. Fitzgerald, Gable Gotwals, A Professional Corporation, Tulsa, Oklahoma, for Defendants-Appellees ONEOK, Inc., ONEOK Energy Services Company L.P.

J. Gregory Copeland and Mark R. Robeck, Baker Botts LLP, Houston, Texas, for Defendant-Appellee Reliant Energy Services, Inc.

Graydon Dean Luthey, Jr. and Sarah Jane Gillett, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, Oklahoma, for Defendants-Appellees The Williams Companies, Inc., Williams Merchant Services Company, Inc., Williams Power Company, Inc., and Williams Energy Marketing & Trading Company.

Michael John Miguel, K & L Gates LLP, Los Angeles, California, for Defendants-Appellees Xcel Energy, Inc., e prime, inc., e prime Energy Marketing, Inc., and Northern States Power Company.

OPINION

BEA, Circuit Judge:

These cases arise out of the energy crisis of 2000–2002. Plaintiffs (retail buyers of natural gas) allege that Defendants (natural gas traders) manipulated the price of natural gas by reporting false information to price indices published by trade publications and engaging in wash sales.[1] Plaintiffs brought various claims in state and federal court beginning in 2005, and all cases were eventually consolidated into the underlying multidistrict litigation proceeding. In July 2011, the district court entered summary judgment against Plaintiffs in

[1] Wash sales are prearranged sales in which traders execute a trade on an electronic trading platform, and then immediately offset that trade by executing an equal and opposite trade.

most of the cases,[2] finding that their state law antitrust claims were preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq* ("NGA"). Plaintiffs appeal the district court's order granting summary judgment, as well as orders denying as untimely Plaintiffs' motions to amend their complaints, orders dismissing the AEP Defendants from two cases for lack of personal jurisdiction, and an order granting partial summary judgment to Defendant Duke Energy Trading and Marketing, LLC.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse the district court's order granting summary judgment to the Defendants, reverse in part the district court's orders dismissing the AEP Defendants from the Wisconsin *Arandell* and Missouri *Heartland* suits, and affirm all of the other orders at issue in this appeal. We remand to the district court for further proceedings consistent with this opinion.

I. FACTS AND REGULATORY FRAMEWORK

A. Energy Crisis of 2000–2002

A brief recitation of the background of this litigation, as well as a description of the regulatory framework governing this case, is useful to set the stage for our holding. These cases arise out of claims that the Defendants violated antitrust laws by

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[2] The district court's judgment is final in all cases except *Sinclair v. E-Prime*, No. 11-16821, and *Sinclair v. Oneok*, No. 11-16818. The Plaintiffs' complaints in the *Sinclair* cases contain federal claims that were not preempted, but the District Court declared that there was "no just reason for delay," making the preemption rulings in *Sinclair v. E-Prime* and *Sinclair v. Oneok* final and appealable pursuant to Federal Rule of Civil Procedure 54(b).

manipulating the natural gas market and selling natural gas at artificially inflated prices, leading to the energy crisis of 2000–2002. The Federal Energy Regulatory Commission ("FERC") conducted a fact-finding investigation of the energy crisis, and concluded that "[s]pot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market." This market distortion stemmed in part from efforts of energy trading companies to manipulate price indices compiled by trade publications.

The natural gas industry relied on two trade publications, *Gas Daily* and *Inside FERC*, which published the most widely-used price indices. *Gas Daily* published a daily gas price index, while *Inside FERC* published a monthly gas price index. *Gas Daily* relied on telephone interviews with natural gas market participants (traders, end users,[3] and producers) to collect pricing data. *Inside FERC* collected pricing data through standardized spreadsheets, which traders filled out and emailed to *Inside FERC*. Buyers and sellers relied on these indices as reference points to determine the market price for natural gas transactions. In short, the prices for actual transactions were pegged to price indices that were subject to manipulation by energy traders.

After the energy crisis of 2000–2002, a number of energy trading companies admitted that their employees provided false pricing data to *Gas Daily* and *Inside FERC*. Government investigations

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[3] The term "end users" refers to industrial, commercial, and residential consumers of gas, such as the Plaintiffs in this case.

revealed that the companies had few, if any, internal controls in place to ensure the accuracy of the data reported to the trade publications. A 2003 FERC report described the process as follows:

> Traders from all companies describe a typical trading day as hectic, pressure packed, and frenetic. One of their many tasks was to report trading data to the Trade Press; this was viewed as bothersome but necessary. Often it was a job given to the newest employee. Many companies report passing around a form and using a spreadsheet on a shared drive. . . . There was nothing to stop a trader from changing the numbers someone else had entered. In other cases, traders took an oral "survey" to get a sense of where the market was trading. Sometimes they represented it to the Trade Press as an actual survey, but in other cases they made up trades to average out to a number that was consistent with this "survey."

In addition to reporting false data to the price indices, traders also manipulated the market by engaging in "wash sales," or prearranged sales in which traders "agreed to execute a buy or a sell on an electronic trading platform . . . and then to immediately reverse or offset the first trade by bilaterally executing over the telephone an equal and opposite buy or sell."

B. Overview of Natural Gas Regulation

Whether Plaintiffs' state law antitrust claims are cognizable depends, for one thing, on whether the field of natural gas regulation has been preempted by federal regulation. This court's preemption

analysis is governed by the framework of natural gas regulation, and more importantly, the distinction between categories of sales that fall within FERC's jurisdiction ("jurisdictional sales") and the categories of sales that fall outside of FERC's jurisdiction ("non-jurisdictional sales").

Individual states were originally responsible for the regulation of the production, sale, and transportation of natural gas. However, as the volume of gas sold and transported along interstate pipelines increased, state regulations became regarded by Congress as ineffective. *See Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 515 (1947). In 1938, Congress enacted the Natural Gas Act ("NGA") in response to the demand for federal regulation and to curb the market power of interstate pipelines. *Id.* at 516; *see also E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1036 (9th Cir. 2007). FERC is the agency charged with the administration of the NGA, and its jurisdiction is laid out in Section 1(b) of the Act as follows:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the

> facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b). Put simply, the NGA applies to: (1) transportation of natural gas in interstate commerce, (2) natural gas sales in interstate commerce for resale (i.e., wholesale sales), and (3) natural gas companies[4] engaged in such transportation or sale. The NGA does *not* apply to retail sales (i.e., direct sales for consumptive use). *See Panhandle Eastern Pipe Line Co.*, 332 U.S. at 517 ("The line of the statute [is] thus clear and complete. It cut[s] sharply and cleanly between sales for resale and direct sales for consumptive uses.").

Since the passage of the NGA, Congress has removed other categories of sales from the scope of FERC's jurisdiction as part of a general effort to reduce federal regulation of the natural gas industry. In 1989, Congress passed the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, which removed "first sales"[5] from FERC's jurisdiction, therefore completely eliminating FERC's authority to set prices at the wellhead. In 1992, to give effect to the North American Free Trade Agreement,

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[4] A "natural-gas company" is defined as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6).

[5] The statutory definition of "first sales" is quite complex, *see* 15 U.S.C. 3301(21), but as this court stated in *Gallo*, "first sales are, in essence, merely sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution company, or retail customer. In other words, sales by pipelines, local distribution companies, and their affiliates cannot be first sales unless these entities are selling gas of their own production." *Gallo*, 503 F.3d at 1037.

Congress amended the NGA to provide that all natural gas sales from Canadian and Mexican sellers to buyers in the United States are also first sales, and therefore not subject to FERC's jurisdiction. *See* Energy Policy Act of 1992, Pub. L. No. 102-486 (codified at 15 U.S.C. § 717b(b)).

The final aspect of the natural gas regulatory scheme relevant to this appeal is FERC's practice of issuing "blanket marketing certificates."[6] Following congressional efforts to reduce federal regulation of the industry, FERC began its own deregulation process. In 1992, FERC promulgated Order 636, which "required all interstate pipelines to 'unbundle'[7] their transportation from their own natural gas sales." *General Motors Corp. v. Tracy*, 519 U.S. 278, 284 (1997); Pipeline Service

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[6] Under blanket certificates issued pursuant to Section 7(c) of the NGA, "a natural gas company may undertake a restricted array of routine activities without the need to obtain a case-specific certificate for each individual project." *See* BLANKET CERTIFICATES, FEDERAL ENERGY REGULATORY COMMISSION (last visited on March 25, 2013), http://www.ferc.gov/industries/gas/indus-act/blank-cert.asp. A company with a blanket certificate may "construct, modify, acquire, operate, and abandon a limited set of natural gas facilities, and offer a limited set of services, provided each activity complies with constraints on costs and environmental impacts set forth in the Commission's regulations." *Id.*

[7] "Prior to the early 1980s, most natural gas was sold at or near the wellhead to the intrastate or interstate pipeline in the field. . . . The pipeline purchasers typically provided a bundled service which included the gathering, processing, storage and transmission of the gas to market." Judith M. Matlock, *Federal Oil and Gas Pipeline Regulation: An Overview*, ROCKY MOUNTAIN MINERAL LAW FOUND. Paper No. 4 (Feb. 23–24, 2011).

Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (Apr. 16, 1992). FERC also issued blanket sale certificates to interstate pipelines that allowed them to offer "unbundled" natural gas at market-based rates, rather than at rates filed with FERC. *See* 57 Fed. Reg. at 13,270. FERC continued its own deregulation process by issuing blanket sales certificates for all other resales of natural gas. *See* Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57,952; 57,957–58 (Dec. 8, 1992). These blanket certificates had the effect of allowing all natural gas companies subject to FERC's jurisdiction to charge market-based rates, as opposed to rates filed with and approved by FERC.

II. PROCEDURAL HISTORY

Beginning in 2001, a series of class action lawsuits were filed around the country and were eventually consolidated into a multi-district litigation in the District of Nevada. Two of the earliest cases, *Texas-Ohio Energy, Inc. v. AEP Energy Services, Inc., et al.* ("*Texas-Ohio*") and *Abelman v. AEP Energy Services, Inc., et al.* ("*Abelman*") alleged both Sherman Act and parallel state antitrust claims. *See In re Western States Wholesale Natural Gas Antitrust Litig.*, 368 F. Supp. 2d 1110 (D. Nev. 2005); *In re Western States Wholesale Natural Gas Antitrust Litig.*, 408 F. Supp. 2d 1055 (D. Nev. 2005). The core allegations in *Texas-Ohio* and *Abelman*—that the defendant energy companies conspired to manipulate the price indices—were similar to the allegations in the present case.

The defendants in *Texas-Ohio* and *Abelman* moved to dismiss the complaints in those cases on the grounds that all claims were barred by the filed-rate doctrine[8] and that the state-law claims were preempted by the NGA. In 2005, four months before the first of the present cases was filed, the District Court granted summary judgment to the *Texas-Ohio* and *Abelman* defendants. It held that because the plaintiffs asked for actual damages, any judgment by the court would necessarily decide whether the privately-published price indices (which the court concluded were effectively FERC-approved rates) were reasonable. Since the price indices used to set the rates were FERC-approved, the federal and state law claims were barred by the filed-rate doctrine. *Texas-Ohio*, 368 F. Supp. 2d at 1116; *Abelman*, 408 F. Supp. 2d at 1069.

Shortly after the judgments in *Texas-Ohio* and *Abelman*, plaintiffs in *Farmland*,[9] *Learjet*, *Breckenridge*, *Arandell*, and *Heartland* began filing

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[8] The filed-rate doctrine "is a judicial creation that arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates for specified utilities" and bars "challenges under state law and federal antitrust laws to rates set by federal agencies." *E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1033 (9th Cir. 2007). *See also Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 577 (1981) (stating that because the Natural Gas Act required sellers of natural gas in interstate commerce to file their rates with FERC for FERC's approval, "[n]o court may substitute its own judgment on reasonableness for the judgment of the Commission").

[9] As a result of bankruptcy proceedings, the name of the Plaintiff in this case has changed to "Reorganized FLI, Inc." For the sake of simplicity we refer to this Plaintiff as "Farmland" in this opinion.

suits alleging state antitrust claims in Colorado, Kansas, Missouri, and Wisconsin state courts. Plaintiffs in *Sinclair v. E-Prime* and *Sinclair v. Oneok* brought suit in federal court, alleging various state and federal causes of action. The state cases were removed to federal court on grounds of diversity of citizenship and all cases were consolidated into the present multidistrict litigation.

Defendants in the present case filed a number of motions for summary judgment, alleging that the Plaintiffs' claims were barred by the filed-rate doctrine, or that their state claims were preempted by the NGA. In 2006, the District Court granted the Defendants' motion to dismiss in *Farmland*, finding that the NGA preempted the Plaintiffs' claims under Kansas antitrust statutes. The District Court reasoned that because the Defendants possessed blanket marketing certificates that subjected Defendants and their conduct to FERC's jurisdiction under the NGA, FERC had exclusive jurisdiction over the alleged anti-competitive misconduct at issue. In July 2007, the District Court reconsidered and vacated its prior ruling granting Defendants' motion to dismiss after Plaintiffs clarified that they did not concede the factual question of whether Defendants possessed blanket marketing certificates.

In September 2007, this court issued its decision in *E. & J. Gallo Winery v. Encana Corp.*, holding that the filed-rate doctrine does not bar state or federal antitrust claims arising out of manipulation of the price indices because the challenged price indices were compiled using transactions outside of FERC's jurisdiction as well as transactions within FERC's jurisdiction. 503 F.3d at 1048.

In November 2007, Defendants filed a new motion for summary judgment in in all of the present cases, arguing that Plaintiffs' state claims were preempted by the NGA. In May 2008, the District Court denied the motion, relying in part on this court's decision in *Gallo*.

In July 2008, Defendants filed a motion for reconsideration of the District Court's May 2008 order, arguing that FERC had jurisdiction during the relevant time period to regulate "any practice" affecting a rate subject to the jurisdiction of the Commission (i.e., a "jurisdictional rate"). In November 2009, the District Court held that because the same price indices are used to set the prices in transactions falling within and outside FERC's jurisdiction, any manipulation of these indices falls within FERC's exclusive jurisdiction under Section 5(a) of the NGA. Section 5(a) provides:

> [Whenever FERC finds] that *any* rate, charge, or classification . . . [or] *rule, regulation, practice, or contract affecting such rate, charge, or classification* is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed or in force, and shall fix the same by order.

15 U.S.C. § 717d (emphases added). The District Court reasoned that pursuant to Section 5(a) of the NGA, FERC has jurisdiction to regulate any "practice" by a jurisdictional seller that affects a jurisdictional rate. The court ordered Defendants to re-file their motion for summary judgment, and in

July 2011, the court granted the Defendants' motion for summary judgment as applied to all Plaintiffs. This appeal followed.

III. THE NATURAL GAS ACT AND PREEMPTION

A. Standard of Review

This court reviews a district court's grant of summary judgment *de novo*. *See Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004). Summary judgment is appropriate only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1075 (9th Cir. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c)). "Viewing the evidence in the light most favorable to the non-moving party," this court "must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). This court also reviews a district court's decisions regarding preemption *de novo*. *See Whistler Investments, Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1163 (9th Cir. 2008).

B. Preemption

The "touchstone in every pre-emption case" is expressed congressional intent. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The Supreme Court recently emphasized that in preemption cases, courts should "start with the assumption that the historic

police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* In the present case, the presumption against preemption applies with particular force in light of Congress's deliberate efforts to preserve traditional areas of state regulation of the natural gas industry.

The question presented by this appeal is as follows: does Section 5(a) of the NGA, which provides FERC with jurisdiction over any "practice" affecting jurisdictional rates, preempt state antitrust claims arising out of price manipulation associated with transactions falling outside of FERC's jurisdiction? We conclude that such an expansive reading of Section 5(a) conflicts with Congress's express intent to delineate carefully the scope of federal jurisdiction through the express jurisdictional provisions of Section 1(b) of the Act. Our analysis is guided by several circuit court decisions counseling in favor of a narrow reading of Section 5(a). As a result, we hold that the NGA does not preempt the Plaintiffs' state antitrust claims, and reverse the district court's order granting summary judgment to the Defendants.

1. When Congress enacted the NGA in 1938, it expressly limited federal jurisdiction over natural gas to "the sale in interstate commerce of natural gas for resale." 15 U.S.C. § 717(b). An early Supreme Court case interpreting the scope of the NGA described Congress's intent as follows:

> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress

> made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to any other . . . sale."

Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind., 332 U.S. 507, 516 (1947). A later Supreme Court decision further emphasized Congress's intent to limit the reach of the NGA:

> When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. It did not envisage federal regulation of the entire natural gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act.

Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 510 (1989). Since the passage of the NGA, Congress has further demonstrated its intent to limit the scope of federal regulation by enacting statutes removing first sales from FERC's jurisdiction. *See* Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157.[10]

2. This court's decision in *Gallo* provides further support for our holding that the NGA does not preempt all state antitrust claims. The claims in *Gallo* were essentially the same as the Plaintiffs' claims in the present case. E. & J. Gallo Winery alleged that EnCana Corp., a natural gas supplier, conspired to inflate the price of natural gas by

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[10] In 1978 Congress enacted the Natural Gas Policy Act ("NGPA"), Pub. L. No. 95-621, 92 Stat. 3352, which eliminated the low price ceilings on wellhead sales. However, the Natural Gas Wellhead Decontrol Act of 1989 ("WDA") completely eliminated FERC's authority to set prices at the wellhead.

manipulating the prices reported to private indices published by natural gas trade publications and the execution of wash trades. *Gallo*, 503 F.3d at 1030–32. Gallo's complaint consisted of federal and state antitrust actions, as well as state-law damages claims. *Id.* at 1032. Encana Corp. moved for summary judgment, claiming that the filed-rate doctrine barred all of Gallo's federal claims, and federal preemption principles barred Gallo's state claims. *Id.* at 1032. The district court denied EnCana's summary judgment motion, and this court affirmed the district court. *Id.* at 1030.

We noted in *Gallo* that although FERC did not set the rates charged by the natural gas companies, it did engage in market oversight by granting blanket market certificates after determining that the seller lacked market power. *Id.* at 1041. As a result of FERC's market oversight, the court found "that the market-based rate for natural gas transactions *under FERC's jurisdiction* are FERC-authorized rates, and cannot be the basis of a federal antitrust or state damage action" because of the filed-rate doctrine. *Id.* at 1043 (emphasis added).

Although this court found that the filed-rate doctrine barred claims based on FERC-authorized rates, it distinguished claims based on FERC-authorized rates from claims based on the rates reported in the price indices. *Id.* at 1045. It stated that the record reflected that "the indices potentially include transactions that are under FERC's jurisdiction as well as transactions outside FERC's jurisdiction." *Id.* There were two relevant categories of non-FERC-authorized rates included in the challenged price indices:

> First, there is evidence in the record some index pricing inputs were misreported or wholly fictitious. Misreported rates and rates reported for fictitious transactions are not FERC-approved rates, and barring claims that such fictitious transactions damaged purchasers in the natural gas market would not further the purpose of the filed rate doctrine.
>
> Moreover, as part of its investigation of the indices, FERC concluded that it "has jurisdiction over *most* of the transactions that form the basis for the indices." . . . This language indicates that at least some of the transactions included in the indices are not subject to FERC's jurisdiction, and thus would be subject to challenge by Gallo.

Id. at 1045 (internal citations omitted). The non-jurisdictional transactions included in the price indices included first sales at the wellhead or via imports from Canada or Mexico. *Id.*

We explained in depth why the removal of certain transactions from FERC's jurisdiction meant that claims arising out of those transactions were not preempted by the NGA. *Id.* at 1046. Most importantly, we assumed that Congress was aware of the existing context of state and federal antitrust law when it enacted the Wellhead Decontrol Act and other statutes limiting FERC's jurisdiction. *Id.* State and federal antitrust laws complement Congress's intent to move to a less regulated market, because such laws support fair competition. *Id.* ("By enabling private parties to combat market manipulation and other anti-competitive actions, the

laws under which Gallo brought its claim support Congress's determination that the supply, the demand, and the price of high-cost first sale gas be determined by market forces.") (internal quotations omitted). For these reasons, we concluded that "Congress did not preclude plaintiffs from basing damage claims on rates associated with first sales." *Id.* Our reasoning in *Gallo* applies with equal force to the question presented by this case: federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction.

C. The NGA's Jurisdictional Limitations

The district court in the present case acknowledged this court's holding in *Gallo*, but distinguished that case on the grounds that "*Gallo* did not address whether FERC's exclusive jurisdiction over natural gas companies *and their practices which affect jurisdictional rates* preempts state jurisdiction over the same subject matter." It reasoned that Defendants' status as FERC-regulated entities, combined with FERC's authority under Section 5(a) of the NGA to regulate "any rule, regulation, practice, or contract" affecting a jurisdictional rate, conferred exclusive jurisdiction on FERC to regulate the conduct at issue in this case.

The district court read the word "practices" in Section 5(a) of the NGA to preempt impliedly the application of state laws to the same transactions (first sales and retail sales) that Congress expressly exempted from the scope of FERC's jurisdiction in Section 1(b) of the Act. However, this reading runs afoul of the canon of statutory construction that statutory provisions should not be read in isolation,

and the meaning of a statutory provision must be consistent with the structure of the statute of which it is a part. *See, e.g.*, *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007) ("When interpreting statutes . . . each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole."). The district court's reading is also inconsistent with case law interpreting the provisions of Section 5(a) of the NGA narrowly to comport with the jurisdictional limitations established by Section 1(b) of the Act. While the Ninth Circuit has not had the opportunity to define the scope of Section 5(a), the Supreme Court and other circuits have read Section 5(a) narrowly to define the scope of FERC's jurisdiction within the limitations imposed by Section 1(b).

1. In *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, the Supreme Court relied on the jurisdictional limitations established in Section 1(b) of the NGA to uphold a state regulation on the production of gas. 489 U.S. 493, 496 (1989). The State Corporate Commission of Kansas (KCC) had adopted a regulation governing the timing of natural gas production from the Kansas-Hugoton field. *Id.* The regulation provided that the right to extract assigned amounts of gas from the field would be lost if pipelines delayed production for too long. *Id.* at 497. Northwest Central Pipeline Corporation challenged the regulation, arguing that it was preempted by federal regulation of the interstate gas industry because the regulation exerted pressure on pipelines to increase their purchases from the Hugoton field and therefore affected the pipelines' cost structures. *Id.* at 497, 507

(noting that Northwest Central argued that "the federal regulatory scheme pre-empts state regulations that may have either a direct or indirect effect on matters within federal control").

The Supreme Court rejected Northwest Central's argument, relying on the fact that Section 1(b) of the NGA "expressly carve[d] out a regulatory role for the States" and provided that states would retain jurisdiction over the production of natural gas. *Id.* at 507. It also rejected the pipeline's claim that federal regulations preempted all state regulations that may affect rates within federal control, stating:

> To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental affect on the costs of purchasers in some market and contractual situation.

Id. at 514.

In *American Gas Association v. Federal Energy Regulatory Commission*, the D.C. Circuit examined FERC's refusal to use its authority under Section 5 of the NGA to modify "take-or-pay" contracts[11] between natural gas producers and pipelines. 912

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[11] Certain contracts entered into by producers and pipelines between 1977–1982 contained "take-or-pay" clauses requiring the pipelines either to purchase a specified percentage of the producer's deliverable gas or to make "pre-payments" for that percentage. *See Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1021 (D.C. Cir. 1987).

F.2d 1496, 1503 (D.C. Cir. 1990). A "major premise" of FERC's refusal to act was its conclusion that its Section 5 power did not reach nonjurisdictional contracts. *Id.* at 1505. The court concluded, "As we read the Natural Gas Act, the Commission was absolutely right: Congress clearly limited its § 5 powers to jurisdictional contracts." *Id.*

The petitioners in *American Gas Association* had offered an argument similar to the one offered by the Defendants in the present case: they isolated the phrase "contract affecting such rates" and argued that FERC had jurisdiction to assess the justness and reasonableness of the provisions of *any* contract that would likely influence a pipeline's end-of-pipelines prices. *Id.* FERC, on the other hand, interpreted "contract affecting such rates" as being limited to contracts involving a jurisdictional seller and directly governing the rate in a jurisdictional sale. *Id.* at 1506. The D.C. Circuit agreed with FERC, stating that "petitioners' theory is, more generally, an oxymoron – Commission jurisdiction over nonjurisdictional contracts." *Id.* The court also noted that the petitioners' expansive reading of Section 5 had no "conceptual core" because under their interpretation, Section 5 would reach "pipelines' contracts for every other possible factor of production – even legal services." *Id.* at 1507.

We find the analysis of these cases persuasive, and apply them here. Interpreting the jurisdictional provision in Section 5(a) broadly to find FERC jurisdiction over price manipulation associated with nonjurisdictional sales would risk nullifying the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority over

nonjurisdictional sales, such as first sales at the wellhead or from sellers in Canada and Mexico. Under the broad reading of Section 5(a) that Defendants propose, there is no "conceptual core" delineating transactions falling within FERC's jurisdiction and transactions outside of FERC's jurisdiction. There would be nothing stopping a future court from finding that first sales themselves (which are exempted from FERC's jurisdiction pursuant to Section 1(b) of the Act) are "practices" affecting jurisdictional rates that fall within the jurisdictional provision in Section 5(a). We reject this broad reading and hold that the district court erred in concluding that FERC had jurisdiction over the reporting practices associated with nonjurisdictional sales under Section 5(a).

2. Another D.C. Circuit case, *California Independent System Operator Corporation v. Federal Energy Regulatory Commission*, does not address the interplay between the jurisdictional limits outlined in Section 1(b) and the jurisdictional provision in Section 5(a), but it does provide further support for a narrow interpretation of the word "practices" in Section 5(a). 372 F.3d 395 (D.C. Cir. 2004). The California Independent System Operator Corporation (CAISO) was a non-profit entity created by the state of California to operate electric grid facilities in California. *Id.* at 397. By statute, CAISO was obligated to follow certain procedures for selecting a board of directors composed exclusively of California residents. *Id.* After the energy crisis of 2000, FERC directed CAISO to utilize a different selection method for its board of directors. *Id.* at 397–98. FERC claimed that it had authority to issue

such a directive under Section 206 of the Federal Power Act,[12] which provided, "Whenever the Commission [shall find] that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential," the Commission shall determine the just and reasonable practice to be observed thereafter. *Id.* at 399 (quoting 16 U.S.C. § 824e(a)). Specifically, FERC claimed that the composition and method of selection of a utility company's governing board was a "practice . . . affecting [a] rate," and that because FERC had found that CAISO's selection method was discriminatory, FERC had authority to determine a just and reasonable practice. *Id.*

The D.C. Circuit began its analysis with the "plain language" of the statutory text. *Id.* at 400. It found that the word "practices" is a word of sufficiently diverse meanings that the proper method for determining Congressional intent was to apply the canon of statutory construction "*noscitur a sociis.*"[13]

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[12] The language at issue from the Federal Power Act in *CAISO* is identical to the language at issue from the NGA in the present case. The Supreme Court noted in *Arkansas Louisiana Gas Company v. Hall* that the relevant provisions of the Federal Power Act and the Natural Gas Act "are in all material respects substantially identical," and therefore the Court's established practice is to "cit[e] interchangeably decisions interpreting the pertinent sections of the two statutes." 453 U.S. 571, 577 n.7 (1981) (internal quotations omitted).

[13] *Noscitur a sociis* means that "a word is known by the company it keeps," and this canon is applied "where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

The court looked at the word "practices" in context, finding that Section 5(a) comes into play only after the Commission has a hearing and determines that a "rate, charge, or classification" employed by a regulated utility in a jurisdictional transaction is unjust or unreasonable. *Id.* Therefore, the court found that by using the word "practice," Congress had intended to empower FERC to "effect a reformation of some 'practice' in a more traditional sense of actions habitually being taken by a utility in connection with a rate found to be unjust or unreasonable." *Id.* The court noted that the implications of a broader reading of the word "practices" would be "staggering" because FERC would have jurisdiction over a plethora of activities, such as the methods of contracting for services, labor, or office space, as long as FERC found that such "practices" affected the jurisdictional rates. We agree with the D.C. Circuit's approach to reading the word "practices" narrowly as to not expand unduly the scope of FERC's jurisdiction.

3. Defendants rely on *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*") for the proposition that "FERC's jurisdiction over a practice or contract affecting a jurisdictional rate preempts state law from being used to regulate that practice or contract." *Mississippi Power & Light* involved a FERC order requiring four utility companies to purchase a particular share of a nuclear power plant's output at rates FERC determined to be just and reasonable. *Mississippi Power & Light Co.*, 487 U.S. at 364. One of the utility companies, Mississippi Power & Light, filed an application with the Mississippi Public

Service Commission ("MPSC") seeking a substantial increase in its retail rates to recoup the costs of purchasing a portion of the nuclear power plant's output. *Id.* at 365. The Mississippi Supreme Court eventually ruled that the MPSC was required, in accordance with state law, to review the prudence of incurring costs associated with purchasing the nuclear power plant's output. *Id.* at 367.

The Supreme Court reversed. The Court stated that FERC's exclusive jurisdiction over wholesale rates also encompassed "power allocations that affect wholesale rates." *Id.* at 371. Because the "prudence inquiry" mandated by the Mississippi Supreme Court required the state commission to review the prudence of the FERC order determining the allocation of costs associated with the nuclear power plant, the inquiry was preempted by FERC's exclusive jurisdiction. *Id.* The Court concluded, "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." *Id.* at 371.

We do not find Defendants' reliance on *Mississippi Power & Light Co.* to be persuasive. *Mississippi Power & Light Co.* stands for the proposition that states cannot use their jurisdiction over retail rates to second-guess or review FERC-authorized rates that may affect retail rates. *See Gallo*, 503 F.3d at 1044 (relying on *Mississippi Power & Light Co.* to "support EnCana's position that wholesale sellers such as EnCana may raise the filed rate doctrine as a defense to actions putatively attacking retail rates, but having the effect of disallowing FERC-approved wholesale rates."). However, *Mississippi Power &*

Light Co. does not support Defendants' broad reading of the phrase "practice . . . affecting [jurisdictional] rates." In *Mississippi Power & Light Co.*, FERC had used its jurisdiction over practices affecting wholesale rates to determine an equitable allocation of nuclear power costs. Defendants attempt to analogize the power allocations at issue in *Mississippi Power & Light Co.* with the market manipulation associated with nonjurisdictional transactions at issue in the present case. However, that analogy cannot be squared with the *Gallo* court's holding that the NGA does not preempt state antitrust challenges to rates and practices associated with such nonjurisdictional sales.

D. FERC's Regulatory Authority

One final issue dividing the parties in this appeal is the extent to which FERC had authority to regulate the market manipulation that gave rise to the energy crisis in 2000–2001. The Defendants point to the Code of Conduct promulgated by FERC in 2003 as evidence that FERC had regulatory authority over the anticompetitive conduct at issue, including the false price reporting and wash sales. FERC promulgated the Code of Conduct by amending the blanket market certificates governing jurisdictional sellers. *See* Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323 (Nov. 26, 2003). The Commission stated that the need for the Code of Conduct "was informed by the types of behavior that occurred in the Western markets during 2000 and 2001." *Id.* ¶ 2. The Code prohibited *jurisdictional* sellers[14] "from engaging in actions without a

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[14] Section III.A of the Commission's final order is titled "Application of Code of Conduct to Jurisdictional Sellers," and

legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." *Id.* ¶ 4. The Code further provides that jurisdictional sellers are required to provide complete and accurate transactional information to publishers of gas price indices. *Id.* ¶ 5.

While Defendants rely on the promulgation of the Code of Conduct as evidence that FERC had jurisdiction over the market manipulation at issue, there are two significant flaws in their argument. First, two years after the promulgation of the Code, Congress enacted the Energy Policy Act of 2005 ("EPA"),[15] which prohibits market manipulation and authorizes FERC to promulgate rules and regulations to protect natural gas ratepayers. There is a canon of statutory interpretation that counsels against reading acts of Congress to be superfluous. *See American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992). This canon suggests that Congress

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paragraphs 14–22 discuss the scope of FERC's jurisdiction over the natural gas industry.

[15] The EPA provides, in relevant part:

> It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance. . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.

Pub. L. No. 109-58 tit. III, § 315 (codified at 15 U.S.C. § 717c-1).

enacted the relevant provision of the EPA *because* FERC did not already have regulatory authority over the anticompetitive conduct at issue.

The second flaw in Defendants' argument is more relevant to our jurisdictional analysis. Even if FERC did have the statutory authority to promulgate the 2003 Code of Conduct and to make it applicable to "first sales" and other nonjurisdictional sales, a close reading of the Code reveals that FERC limited the application of the Code to sales within its jurisdiction. FERC acknowledged that because of acts deregulating first sales of natural gas, such sales were outside the scope of FERC's jurisdiction. Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323 ¶ 14 (Nov. 26, 2003). FERC further noted that some commenters had raised "concerns regarding the potential adverse effect of imposing the proposed code of conduct only on the portion of the natural gas market under the Commission's jurisdiction," *id.* ¶ 16, and responded by stating, "The fact that the Commission does not regulate the entire natural gas market does not compel the Commission to refrain from exercising its authority over that portion of the gas market which is within its jurisdiction to prevent the manipulation of prices." *Id.* ¶ 21. The discussion of jurisdictional limitations within the Code of Conduct itself suggests that the Code does *not* support the Defendants' argument that FERC had jurisdiction over the anticompetitive behavior related to nonjurisdictional sales. For these reasons, the 2003 enactment of the Code of Conduct does not affect our conclusion that the NGA does not grant FERC jurisdiction over claims arising out of

false price reporting and other anticompetitive behavior associated with nonjurisdictional sales.

IV. THE DISTRICT COURT'S ORDERS DENYING PLAINTIFFS LEAVE TO AMEND

The *Farmland*, *Breckenridge*, *Learjet*, and *Heartland* Plaintiffs appeal the district court's October 29, 2010, order denying them leave to amend their complaints to add federal antitrust claims. Their motions for leave to amend their complaints were filed nine months after the March 2, 2009, scheduling deadline to amend pleadings. The *Breckenridge* Plaintiffs also appeal the district court's April 21, 2008, order denying them leave to amend their complaint to add a state law treble damages remedy.

We review a district court's decision denying leave to amend pleadings for abuse of discretion. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). We hold that in the present case, the district court did not abuse its discretion in denying either of the two motions for leave to amend complaints, and therefore affirm both the October 29, 2010, order denying the *Farmland*, *Breckenridge*, *Learjet*, and *Heartland* Plaintiffs leave to amend their complaints to add federal antitrust claims, as well as the April 21, 2008, order denying the *Breckenridge* Plaintiffs leave to amend their complaint to add a state law treble damages claim.

A. October 29, 2010, Order

We summarize briefly the procedural history of this case to provide context for our decision to affirm the district court's October 29, 2010, order.

On April 8, 2005, the district court granted summary judgment to the defendants in the *Texas-Ohio* and *Abelman* cases on the ground that the plaintiffs' claims in those cases were barred by the filed-rate doctrine. *See In re Western States Wholesale Natural Gas Antitrust Litig.*, 368 F. Supp. 2d 1110 (D. Nev. 2005), *rev'd by* 243 Fed. App'x 328 (9th Cir. 2007) and *In re Western States Wholesale Natural Gas Antitrust Litig.*, 408 F. Supp. 2d 1055 (D. Nev. 2005), *rev'd by* 248 Fed. App'x 821 (9th Cir. 2007). Four months later, the first of these present actions was filed. In September 2007, this court issued its decision in *Gallo* and simultaneously reversed *Texas-Ohio* and *Abelman*, holding that the filed-rate doctrine does not bar state or federal antitrust claims arising out of the allegations that energy traders manipulated the price index. *See E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027 (9th Cir. 2007); *In re Western States Wholesale Natural Gas Antitrust Litig.*, 243 Fed. App'x 328 (9th Cir. 2007) (reversing *Texas-Ohio*); *In re Western States Wholesale Natural Gas Antitrust Litig.*, 248 Fed. App'x 821 (9th Cir. 2007) (reversing *Abelman*). In November 2007, Defendants in the present case filed a new motion for summary judgment, and in May 2008, the District Court denied the motion, relying in part on *Gallo*. In July 2008, Defendants asked the District Court to reconsider its May 2008 order denying their preemption-based motion for summary judgment. Finally, in November 2009 the District Court agreed to reconsider its May 2008 order.

The deadline to amend pleadings in this case was March 2, 2009. On December 15, 2009

(approximately one month after the District Court agreed to reconsider its May 2008 order denying summary judgment), Plaintiffs filed motions to modify the scheduling order and for leave to amend their complaints to add claims under the federal Sherman Antitrust Act.

The district court denied the Plaintiffs' motions to amend their pleadings, noting that when a party seeks to amend a pleading after the pretrial scheduling order's deadline for amending the pleadings has expired, the moving party must satisfy the "good cause" standard of Federal Rule of Civil Procedure 16(b)(4), which provides that "[a] schedule may be modified only for good cause and with the judge's consent," rather than the liberal standard of Federal Rule of Civil Procedure 15(a).[16] "Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 609. While a court may take into account any prejudice to the party opposing modification of the scheduling order, "the focus of the [Rule 16(b)] inquiry is upon the moving party's reasons for seeking modification . . . [i]f that party was not diligent, the inquiry should end." *Id.*

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[16] Fed. R. Civ. P. 15(a) provides that a party may amend its pleadings once as a matter of course within certain deadlines, and that in "all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. *The court should freely give leave when justice so requires.*" (emphasis added).

The district court in the present case noted, "The good cause standard typically will not be met where the party seeking to modify the scheduling order has been aware of the facts and theories supporting amendment since the inception of the action." The district court found that Plaintiffs were not diligent in seeking the amendment to add federal Sherman Antitrust Act claims, because they had known since 2007 (after this court held in *Gallo* that federal antitrust claims were not barred by the filed-rate doctrine) that federal antitrust claims may be viable.

We hold that the district court did not abuse its discretion in concluding that the Plaintiffs were not diligent in seeking to amend their complaints to add federal antitrust claims. Our analysis is guided by this court's decision in *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992). In *Johnson*, Dairl Johnson was injured while skiing at Mammoth Mountain ski resort. *Id.* at 606. He filed a diversity action against the ski lift manufacturer and Mammoth Recreations, Inc., a holding company that owned a majority of the stock in Mammoth Mountain Ski Area, Inc., the entity that actually owned and operated the ski resort. *Id.* The district court filed a scheduling order which established a cut-off date of October 17, 1989, for joining additional parties. *Id.* Four months after this deadline passed, Johnson moved to join Mammoth Mountain Ski Area, Inc., claiming that he was unaware of the existence of Mammoth Mountain Ski Area, Inc., and its corporate relationship with Mammoth Recreations, Inc. *Id.* at 607. The court found that Johnson had failed to demonstrate good cause for his belated motion to amend, since "Mammoth

Recreation's answer to the complaint and response to interrogatories amply indicated that Mammoth Recreations did not own and operate the ski resort, and thus any theory of liability predicated upon that fact would fail." *Id.* at 609. As in *Johnson*, the Plaintiffs here have failed to demonstrate good cause for their untimely motion to amend, and thus, the district court did not abuse its discretion in denying that motion. We therefore affirm the district court's October 29, 2010, order denying Plaintiffs leave to amend their complaints to add federal antitrust claims.

B. April 21, 2008, Order

On March 4, 2008, the *Heartland* Plaintiffs filed a motion for leave to amend their complaint to add a treble damages claim under the Colorado state antitrust statute. Previously, their complaint had sought only a full refund. The district court denied the motion, stating, "Plaintiffs have been aware of the availability of an actual damages claim under the Colorado antitrust statutes since the inception of the case, but chose to plead under the full refund provision only." The district court found that Plaintiffs' failure to seek leave to add an actual damages claim was explicable during the time between the district court's 2005 ruling in *Texas-Ohio* and *Abelman* that such claims were barred by the filed-rate doctrine and this court's decision in *Gallo* holding that such claims were *not* barred. However, this court decided *Gallo* in September 2007, and Plaintiffs did not move to amend their complaint to add an actual damages claim until March 4, 2008.

The district court considered it relevant that Plaintiffs had requested leave to amend to add an additional defendant on October 12, 2007, but did not make a request to add the treble damages claim at that time. The court denied the Plaintiffs' March 4, 2008, motion for leave to amend to add a treble damages claims, finding that Plaintiffs unduly delayed amendment by waiting "until after this Court granted summary judgment on the full consideration claim, several months after *Gallo*, to seek leave to amend to add a new theory of liability of which Plaintiffs have been aware since the inception of this suit."

Although Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires," it "is not to be granted automatically." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). This court considers the following five factors to assess whether to grant leave to amend: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended his complaint." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

The district court in the present case relied heavily on the fifth factor. It noted that a "district court's discretion [whether to grant leave to amend] is 'particularly broad' in deciding subsequent motions to amend where the court previously granted leave to amend." This court's decision in *Royal Insurance Company of America v. Southwest Marine*, 194 F.3d 1009 (9th Cir. 1999) is instructive. Royal Insurance Company sued Southwest for breach of contract, breach of warranty, and negligence after Southwest

allegedly caused $900,000 of damage to a boat insured by Royal Insurance. *Id.* at 1013. Royal Insurance amended its complaint twice – once to correct minor deficiencies in the original complaint, and once to assert additional claims against Southwest. *Id.* at 1013 n.1. However, the district court denied Royal Insurance's motion for leave to file a third amended complaint to assert further claims against Southwest, which Royal filed after the district court granted summary judgment in favor of Southwest. *Id.* at 1013.

On appeal, this court stated, "Late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Id.* at 1016–17 (internal quotation marks omitted). We relied on the fact that Royal Insurance had knowledge of the relevant facts from the inception of the lawsuit, and also the fact that Royal had twice before amended its complaint, to hold that the district court did not abuse its discretion by denying Royal's motion for leave to file a third amended complaint. *Id.* at 1017 ("Considering that Royal had twice before amended its complaint and moved to amend a third time only after the district court dismissed its claims on summary judgment, the district court did not abuse its discretion by denying Royal's motion to amend.").

In the present case, we find that the district court did not abuse its discretion in denying the *Heartland* Plaintiffs' motion for leave to amend to add a treble damages state law claim. We therefore affirm the district court's order denying that motion.

V. DISMISSAL OF THE AEP DEFENDANTS FROM THE *ARANDELL* AND *HEARTLAND* LAWSUITS

The district court entered separate orders dismissing the AEP Defendants[17] from the *Arandell* suit filed in Wisconsin state court and dismissing the AEP Defendants from the *Heartland* suit filed in Missouri state court prompted by the AEP Defendants' motions to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). This court reviews *de novo* a district court's determination that it does not have personal jurisdiction over a defendant. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

A. Facts

The operative facts alleged in each case are substantially similar. The *Arandell* Plaintiffs filed a class action in Wisconsin pursuant to the Wisconsin Antitrust Act, Wisconsin Statutes ch. 133, brought by and on behalf of a class consisting of all Wisconsin industrial and commercial purchasers of natural gas for consumption in Wisconsin between January 1, 2000 and October 21, 2002. Their complaint alleged that during the relevant time period, the Defendants conspired to restrain trade or commerce relating to natural gas.

The *Heartland* Plaintiffs filed a class action in Missouri pursuant to the Missouri Antitrust Laws, Missouri Statutes § 416.010 *et seq.*, brought by and

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[17] The "AEP Defendants" are American Electric Power Company ("AEP") and its subsidiary, AEP Energy Services, Inc ("AEPES").

on behalf of a class consisting of all Missouri industrial and commercial purchasers of natural gas for consumption in Missouri between January 1, 2000 and October 21, 2002. Their complaint alleged that during the relevant time period, the Defendants conspired to restrain trade or commerce relating to natural gas.

None of the following basic facts about AEP's corporate structure are in dispute. AEP is a New York corporation with its principal place of business in Columbus, Ohio. During the relevant time period in each case, AEP wholly owned and controlled its subsidiary, AEP Energy Services, Inc. (AEPES), an Ohio corporation with a principal place of business in Columbus, Ohio. AEP is a holding company that derives its income from dividends on its subsidiaries' stocks; the AEP Defendants have no office, bank accounts, property, or employees in either Wisconsin or Missouri; the AEP Defendants have not qualified to do business in either Wisconsin or Missouri and have not appointed a registered agent for service of process in either of those states; the AEP Defendants have not paid taxes, manufactured products, or performed services in either Wisconsin or Missouri; and the AEP Defendants have not directed advertising specifically at Wisconsin or Missouri residents.

In the *Arandell* case, the Plaintiffs claim specific personal jurisdiction[18] over the AEP Defendants because their actions pursuant to the alleged

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[18] The *Arandell* Plaintiffs do not argue that the district court could exercise general personal jurisdiction over AEP or AEPES.

conspiracy "were intended to have, and did have, a direct, substantial, and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period." Plaintiffs alleged that personal jurisdiction existed over AEP based on the activities of its corporate affiliates, namely AEPES, which entered into a long-term "natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement."

The district court found that from 1998–2003, AEPES entered into natural gas supply agreements with various Wisconsin companies, and that trade confirmations evince numerous sales made to companies with Wisconsin addresses throughout 2001–2003. AEP acted as a guarantor for AEPES during the relevant time period to facilitate AEPES's business, including issuing guarantees on AEPES's behalf to several Wisconsin-based entities. However, AEPES has never entered into a contract or delivered gas to any of the named plaintiffs in the case.

The *Heartland* case presents substantially similar facts. The *Heartland* Plaintiffs claim specific personal jurisdiction[19] over the AEP Defendants because their actions pursuant to the alleged conspiracy "were intended to have, and did have, a direct, substantial, and reasonably foreseeable effect on commerce in Missouri during the Relevant Time

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[19] The *Heartland* Plaintiffs do not argue that the district court could exercise general personal jurisdiction over AEP or AEPES.

Period." Plaintiffs allege that personal jurisdiction existed over AEP based on the activities of its corporate affiliates, namely AEPES, which sold natural gas to Missouri entities during the relevant time period. The Plaintiffs also allege that one of the primary Missouri entities that AEP traded with, Aquila Merchant Services, was "an active member of the conspiracy to manipulate natural gas prices."

The district court found that from 1997–2001, AEPES entered into natural gas supply agreements with various Missouri companies. From 2000–2002, AEPES sold billions of dollars worth of natural gas to Missouri-based entities. AEP acted as a guarantor for AEPES during the relevant time period to facilitate AEP Energy Services's business, including issuing guarantees on AEPES's behalf to several Missouri-based entities. However, AEPES has never entered into a contract with either of the named Plaintiffs in this case.

B. Analysis

When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128–29 (9th Cir. 2003). However, the plaintiff must make "only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). For the purposes of deciding whether a prima facie showing has been made, "the court resolves all disputed facts in favor of the plaintiff." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006).

Personal jurisdiction over a nonresident defendant is proper if permitted by a state's long-arm statute[20] and if the exercise of that jurisdiction does not violate federal due process. *Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 893 (9th Cir. 1996). For the exercise of jurisdiction to satisfy due process, a nonresident defendant, if not present in the forum, must have "minimum contacts" with the forum such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). A federal district court may exercise either general or specific personal jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15 (1984). To establish general jurisdiction, the plaintiff must demonstrate that the defendant has sufficient contacts to "constitute the

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[20] The Wisconsin Supreme Court has held that Wisconsin's long-arm statute, Wis. Stat. § 801.05, allows for the exercise of jurisdiction to the full extent allowed by the due process clause. *See Rasmussen v. General Motors Corp.*, 803 N.W.2d 623, 630 (Wis. 2011) (stating that "§ 801.05 was intended to provide for the exercise of jurisdiction over nonresident defendants to the full extent consistent with the requisites of due process of law") (internal citations omitted). The "jurisdictional inquiries under state law and federal due process merge into one analysis" when, as here, the state's long-arm statute is "coextensive with federal due process requirements." *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991). In Missouri, however, the Missouri Supreme Court has held that there are two separate inquiries: "one inquiry to establish if a defendant's conduct was covered by the long-arm statute, and a second inquiry to analyze whether the exercise of jurisdiction comports with due process requirements." *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 909 (8th Cir. 2012) (citing *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. 2010)).

kind of continuous and systematic general business contacts that approximate physical presence." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124 (9th Cir. 2002) (internal quotation marks omitted). However, because the Plaintiffs do not claim that the district court could exercise general jurisdiction in either Wisconsin or Missouri over the AEP Defendants in this case, the only relevant question on appeal is whether the district court could exercise specific personal jurisdiction over the AEP Defendants.

This court uses the following three-part test to analyze whether a party's "minimum contacts" meet the due process standard for the exercise of specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable

Schwarzenegger, 374 F.3d at 802. "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995). While all three requirements must be met, this court has stated that in its consideration of the first two

prongs, "[a] strong showing on one axis will permit a lesser showing on the other." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1210 (9th Cir. 2006) (en banc). That means that a single forum state contact can support jurisdiction if the cause of action arises out of that particular purposeful contact of the defendant with the forum state. *Id.* (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). The district court in the *Arandell* and *Heartland* cases focused its analysis on the allegations that AEPES made sales to Wisconsin- and Missouri-based entities and found that the Plaintiffs had not met their burden of proving the second requirement for specific jurisdiction.[21] This court has referred to the second prong of the specific jurisdiction test as a "but for" test. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1988), *rev'd on other grounds, Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).[22] Under the "but for" test, "a lawsuit arises out of a defendant's contacts with the forum state if a direct nexus exists between those contacts and the cause of action."

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[21] The district court assumed, without expressly deciding, that AEPES's sales to Wisconsin- and Missouri-based entities and delivery of natural gas to the forum were sufficient to satisfy the "purposeful availment" prong of the specific jurisdiction inquiry. Because it found that Plaintiffs failed to show that their claims arose out of AEPES's contacts with Wisconsin and Missouri, it did not address the third prong of the specific jurisdiction inquiry (whether the exercise of jurisdiction would be reasonable).

[22] *See Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1051 n.7 (9th Cir. 1997) (noting that even after the Supreme Court's decision in *Shute*, "the 'but for' test is still employed in determining whether a plaintiff's injuries arose out of the defendant's forum-related activities.").

Fireman's Fund Ins. Co., 103 F.3d at 894. The district court found that there was no causal nexus between AEP Defendants' activities in the forum states (selling natural gas to non-Plaintiff third parties) and the harm allegedly suffered by the Plaintiffs (buying gas at inflated prices from third party sellers).

We need not decide whether personal jurisdiction could be grounded on the AEP Defendants' sales of natural gas in the forum states to third parties. The *Arandell* and *Heartland* Plaintiffs also predicated their antitrust claims on the AEP Defendants' manipulation of the price indices pursuant to a conspiracy to inflate natural gas prices. The district court conducted the personal jurisdiction analysis based on the natural gas sales only. We find that the district court erred in failing to analyze whether Plaintiffs' allegations of anticompetitive behavior directed at the forum states are sufficient to support the exercise of specific personal jurisdiction.

There is no question that the Plaintiffs' state antitrust claims arise out of the AEP Defendants' collusive manipulation of the gas price indices.[23] In other words, their claims "arise[] out of or relate[] to" the Defendants' alleged forum-related activities. *Schwarzenegger*, 374 F.3d at 802. The second prong of the test for specific personal jurisdiction is

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[23] For example, the *Arandell* Plaintiffs allege, "The actions of the defendants resulted in the plaintiffs paying inflated prices for natural gas during the Relevant Time Period. During the Relevant Time Period, natural gas prices in Wisconsin more than doubled. The plaintiffs paid higher prices for natural gas than they otherwise would have paid if the defendants' conspiracy had not existed."

therefore satisfied. The key issue in this analysis is therefore whether the AEP Defendants' price manipulation satisfies the *first* prong of the specific personal jurisdiction inquiry, i.e., whether "[t]he non-resident defendant . . . purposefully direct[ed] his activities or consummat[ed] some transaction with the forum or resident thereof; or perform[ed] some act by which he purposefully avail[ed] himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws." *Id.* This first prong is satisfied by showing either purposeful availment or purposeful direction, which are two distinct concepts. *See Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 672 (9th Cir. 2012).

"Purposeful direction" requires that the defendant allegedly must have "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Washington Shoe*, 704 F.3d at 673 (quoting *Mavrix Photo, Inc. v. Brand Techs, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011)). This test for "purposeful direction" is based on the Supreme Court's test in *Calder v. Jones*, 465 U.S. 783 (1984).[24]

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[24] The plaintiff in *Calder* was an entertainer who lived and worked in California. 465 U.S. at 785. She brought suit in California state court against the National Enquirer after the tabloid published a story alleging that the plaintiff had an alcohol problem. *Id.* at 784, 788 n.9. The article was written in Florida, and the National Enquirer was published in Florida with a large circulation in California. *Id.* at 785. The California courts "concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to [the plaintiff] in California." *Id.* at 787. The

The facts alleged in these causes of action present a compelling case for finding that the AEP Defendants "purposefully directed" their anticompetitive behavior at the forum states. The first two prongs of the "purposeful direction" test ask whether there was an "intentional act"[25] that was "expressly aimed at the forum state."[26] Here, the pleadings contain allegations of "intentional acts" in the form of anticompetitive behavior expressly aimed at the forum states. The Wisconsin *Arandell* Plaintiffs alleged, for example, that AEP "either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information," actions which were "intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin." By alleging acts "intended to have" an effect in Wisconsin, the Plaintiffs went beyond alleging acts with a "mere foreseeable effect" in the forum. *See Pebble Beach*, 453 F.3d 1156 (citing

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Supreme Court affirmed, holding that jurisdiction in California was proper because the defendants' intentional conduct in Florida was calculated to cause injury to the plaintiff in California. *Id.* at 791.

[25] This court has recently defined "intentional act" as "an external manifestation of the actor's intent to perform an actual, physical act in the real world, not including any of its actual or intended results." *Washington Shoe*, 704 F.3d at 674.

[26] "We have repeatedly stated that the 'express aiming' requirement is satisfied, and specific jurisdiction exists, when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Washington Shoe*, 704 F.3d at 675 (internal quotation marks omitted).

Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000)). They alleged intentional acts by the AEP Defendants that were "directed at the forum state" itself. *Id.* at 1158.

The *Arandell* Plaintiffs further alleged that AEP's officers or directors made agreements "which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Wisconsin" and that these officers or directors made "strategic marketing policies and decisions" to report prices to natural gas price indices "that affected the market prices of natural gas." The policies and decisions, alleged the *Arandell* Plaintiffs, were "implemented on an operational level by affiliates, such as [AEPES]." The *Arandell* Plaintiffs also claimed that all Defendants (including the AEP Defendants) "worked together to fraudulently increase the retail price of natural gas paid by commercial entities in Wisconsin." This conspiracy was allegedly carried out through unlawful acts that were "ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of defendants' business or affairs." For example, the Plaintiffs alleged that "American Electric Power Company and AEP Energy Services, Inc. traders were instructed by their superiors to adjust the prices and volumes of trades they had made and, in some cases, to report trades that never occurred." The "purpose and effect" of this was to "collusively and artificially inflate the price of natural gas paid by commercial entities in Wisconsin." These alleged facts, taken as true, establish that the AEP Defendants' price

manipulation was "expressly aimed" at Wisconsin, because the AEP Defendants knew and intended that the consequences of their price manipulation would be felt in Wisconsin. *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1258 (9th Cir. 2008).

The third prong of the "purposeful direction" test asks whether the intentional acts caused harm that the defendant knows is likely to be suffered in the forum state. In the present case, the *Arandell* Plaintiffs further alleged that each defendant "committed one or more acts or omissions outside of Wisconsin, which caused an injury to person or property within Wisconsin." Such injury included increases in the price of gas, which was specifically alleged in the complaint – for example, the Plaintiffs alleged that the city gate price for natural gas in Wisconsin nearly quadrupled in the span of a year, while the price for commercial consumers more than doubled. The harm was magnified by increased price volatility, which "caused commercial entities in Wisconsin to incur greater expenses associated with hedging natural gas costs," further injuring the Plaintiffs by "depriving them of the right and ability to make risk management, resource allocation and other financial decisions relating to natural gas, in a full and free competitive market."

In this case, the amount of harm in Wisconsin, and the specificity with which it was alleged, is sufficient to satisfy the third prong of the "purposeful direction" test. Our case law does not require that the "brunt" of the harm be suffered in the forum state; as long as "a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been

suffered in another state." *La Ligue*, 433 F.3d at 1207. For these reasons, we find that the *Arandell* Plaintiffs have alleged sufficient facts to support the exercise of specific personal jurisdiction over the AEP Defendants on the theory that the AEP Defendants "purposefully directed" their anticompetitive conduct at the forum state of Wisconsin.

The district court did not address the third prong of the personal jurisdiction inquiry, whether the exercise of jurisdiction would "comport with fair play and substantial justice" – in other words, whether the exercise of jurisdiction would be reasonable. *Schwarzenegger*, 374 F.3d at 802. Once the Plaintiffs have shown that the exercise of personal jurisdiction satisfies the first two prongs of the personal jurisdiction test, the burden shifts to the defendant to make a "compelling case" that the exercise of jurisdiction would be unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). This court considers the following seven factors in determining whether the exercise of jurisdiction would be reasonable:

> (1) the extent of the defendant's purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to the plaintiff's interest in convenient and effective relief, and (7) the existence of an alternative forum.

Bancroft, 223 F.3d at 1088. We find that the AEP Defendants have not made a "compelling case" based upon any of these factors that the exercise of personal jurisdiction in Wisconsin would be unreasonable.

For these reasons, we reverse the district court's order dismissing the AEP Defendants from the Wisconsin *Arandell* case for lack of personal jurisdiction. The Missouri *Heartland* Plaintiffs alleged similar facts as the Wisconsin *Arandell* Plaintiffs, and therefore our analysis applies with equal force to the *Heartland* case. We note, however, that the *Heartland* Plaintiffs appeal the district court's dismissal of AEPES for lack of personal jurisdiction, but do not challenge the district court's dismissal of AEP, the parent company.[27] The *Heartland* Plaintiffs thus appear to have waived any argument for personal jurisdiction over AEP and we reverse the district court's order in *Heartland* dismissing the AEP Defendants for lack of jurisdiction in *Heartland* as to AEPES only.

VI. Order Granting Duke Energy Trading and Marketing's Motion for Partial Summary Judgment

Several Plaintiffs in *Arandell Corp. v. Xcel Energy, Inc.* appeal the district court's order granting Defendant Duke Energy Trading and Marketing, LLC's ("DETM") motion for partial summary judgment based on the district court's interpretation

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[27] The *Heartland* Plaintiffs' opening brief states, "the *Heartland* plaintiffs are appealing the District Court's dismissal of one defendant—AEP Energy Services, Inc.—from that case for lack of personal jurisdiction."

of Wisconsin Statutes § 133.14.[28] This court reviews *de novo* a district court's interpretation of state law. *See Hauk v. J.P. Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009).

Several Wisconsin corporations (Arandell Corp., Merrick's, Inc., Safety-Kleen Systems, Inc., and Sargento Foods) brought suit against natural gas sellers in Wisconsin state court, alleging two causes of action under Wisconsin state law. Count One arose under Wisconsin Statutes § 133.14, which voids contracts to which an antitrust conspirator is a party and allows recovery of payments made pursuant to such a contract. Count Two sought treble damages under Wisconsin Statutes § 133.18, which provides that "any person" injured, directly or indirectly, by a violation of the Wisconsin Antitrust Act may recover treble damages.

All but one of the named Defendants moved to dismiss or for summary judgment on Count One of Plaintiffs' Amended Complaint. They argued that the Plaintiffs lacked standing to assert a claim against them under Wisconsin Statutes § 133.14 because none of the named Plaintiffs purchased natural gas directly from any of the moving defendants. Wisconsin Statutes § 133.14 provides:

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[28] The Plaintiffs have filed a Motion to Certify Question of Wisconsin State Law to the Wisconsin Supreme Court. Because we find that the plain text of Wisconsin Statutes § 133.14 is clear, we do not believe that certification is necessary as a "means to obtain authoritative answers to unclear questions of state law," and we therefore deny the motion. *Toner v. Lederle Labs., Div. of Amer. Cyanamid Co.*, 779 F.2d 1429, 1432 (9th Cir. 1986).

> All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by [§] 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. *Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefitted from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.*

Wis. Stat. § 133.14 (emphasis added). In interpreting a state statute, a federal court applies the relevant state's rules of statutory construction. *See In re Lieberman*, 245 F.3d 1090, 1092 (9th Cir. 2001). In Wisconsin, to determine the meaning of a statutory provision, courts begin with the statute's plain language, "taking into consideration the context in which the provision under consideration is used," and furthermore, "[s]tatutory language is given its common, ordinary, and accepted meaning." *Burbank Grease Servs., LLC v. Sokolowsi*, 717 N.W.2d 781, 788 (Wis. 2006).

We agree with the district court's conclusion that the statutory text at issue is unambiguous. Section 133.03 makes illegal every contract, combination, or conspiracy in restraint of trade or commerce. *See* Wis. Stat. § 133.03(1). The first sentence of Section 133.14 therefore provides that any contract made by

a member of an antitrust conspiracy is void, and no conspirator who is a party to that contract may recover or benefit therefrom. The second sentence of Section 133.14 permits the party making a payment "upon, under or pursuant to such contract" to recover those payments. There is no provision authorizing recovery by indirect purchasers or other non-parties to the voided contract.[29]

Plaintiffs argue that the Wisconsin legislature intended for the Wisconsin Antitrust Act to be interpreted as broadly as possible. For example, they quote Wisconsin Statutes § 133.01, which provides, "It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition." However, evidence that the legislature intended the Act to be applied broadly cannot overcome the plain text of Section 133.14, which does not provide for recovery for indirect purchasers or other non-parties to the contract.

After the district court held on February 19, 2008, that "the party seeking the recovery [under Section 133.14] must have been a party to the void contract, or at least have made payments based on the contractual obligation set forth in the conspirator's contract," Plaintiffs Sargento, Merrick's, and Ladish admitted that they had no direct purchase agreements with DETM. Therefore, the district

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[29] This is in contrast to Section 133.18, which does permit indirect purchasers to recover treble damages. *See* Wis. Stat. § 133.18 (providing, in relevant part, that "any person injured, *directly or indirectly*, by reason of anything prohibited buy this chapter may sue therefor and shall recover threefold the damages sustained by the person") (emphasis added).

court concluded, "No genuine issue of material fact remains that Sargento, Merrick's, and Ladish did not purchase natural gas directly or through an agent from DETM," and granted summary judgment on Count One of Plaintiffs' Amended Complaint as to these three Plaintiffs. Because we agree with the district court's conclusion that the plain text of Wisconsin Statutes § 133.14 allows recovery only by plaintiffs who were direct purchasers under the voided contract, we affirm the district court's order granting partial summary judgment to DETM.

VII. Conclusion

We **REVERSE** the district court's order granting summary judgment to Defendants on preemption grounds, **REVERSE** in part the district court's orders dismissing the AEP Defendants from the Wisconsin *Arandell* and Missouri *Heartland* suits, and **AFFIRM** all other orders at issue in this appeal. We **REMAND** to the district court for further proceedings consistent with this opinion.[30]

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

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[30] The parties shall bear their own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT
DISTRICT OF NEVADA

2:03-CV-1431-PMP-PAL
BASE FILE

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

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LEARJET, ET AL.
V.
ONEOK, INC., ET AL.,
2:06-CV-00233-PMP-PAL

HEARTLAND REGIONAL MEDICAL CENTER, ET AL.
V.
ONEOK, INC., ET AL.,
2:07-CV-00987-PMP-PAL

BRECKENRIDGE BREWERY OF COLORADO, LLC, ET AL.
V.
ONEOK, INC., ET AL.,
2:06-CV-01351-PMP-PAL

REORGANIZED FLI, INC.
V.
WILLIAMS COMPANIES INC., ET AL.,
2:05-CV-01331-PMP-PAL

ARANDELL CORP., ET AL.
V.
XCEL ENERGY, INC., ET AL.,
2:07-CV-01019-PMP-PAL

ARANDELL CORP., ET AL.

v.

CMS ENERGY CORP., ET AL.,

2:09-CV-01103-PMP-PAL

NEWPAGE WISCONSIN SYSTEM, INC.

v.

CMS ENERGY RESOURCE MANAGEMENT CO., ET AL.,

2:09-CV-00915-PMP-PAL

SINCLAIR OIL CORPORATION

v.

E-PRIME, INC. AND XCEL ENERGY INC.,

2:06-CV-00267-PMP-PAL

MULTIUT CORPORATION

v.

DYNEGY, INC., ET AL.,

2:05-CV-01300-PMP-PAL

SINCLAIR OIL CORPORATION

v.

ONEOK ENERGY SERVICES COMPANY, L.P.

2:05-CV-01396-PMP-PAL

ORDER

Re: Doc. #1880, #1884, #1891 & #1944

Presently before the Court is Defendants' Joint Renewed Motion and Motion for Summary Judgment (Doc. #1880), filed on December 16, 2009. Plaintiffs filed a Joint Opposition (Doc. #1900) on February 1, 2010. The Wisconsin Plaintiffs also filed an Opposition (Doc. #1904) on February 1, 2010.

Defendants filed a Reply (Doc. #1910) on February 26, 2010. Plaintiffs filed a Surreply (Doc. #1924-1) on March 12, 2010. Defendants filed a Notice of Supplemental Authority (Doc. #1961) on December 3, 2010. Plaintiffs filed a Response (Doc. #1962) on January 7, 2011. Defendants filed a Reply (Doc. #1964) on February 1, 2011.

Also before the Court is the ePrime Defendants' Notice of Motion and Motion for Partial Summary Judgment Based on Preemption (Doc. #1884), filed on December 16, 2009. Plaintiff Sinclair Oil Corporation filed an Opposition (Doc. #1896) on February 1, 2010. The ePrime Defendants filed a Reply (Doc. #1916) and request for judicial notice (Doc. #1917) on February 26, 2010. Plaintiffs filed an Opposition (Doc. #1925) to the request for judicial notice on March 15, 2010. The ePrime Defendants filed a Reply (Doc. #1932) on March 24, 2010.

Also before the Court is Dynegy Inc. and Dynegy Marketing and Trade's Motion for Partial Summary Judgment (Doc. #1891), filed on January 14, 2010. Plaintiff Multiut Corporation filed an Opposition (Doc. #1919) on March 1, 2010. Defendants Dynegy Inc. and Dynegy Marketing and Trade filed a Reply (Doc. #1934) on April 2, 2010.

Also before the Court is ONEOK Energy Services Company's Motion for Partial Summary Judgment (Doc. #1944), filed on May 26, 2010. Plaintiff Sinclair Oil Corporation filed an Opposition (Doc. #1950) on June 10, 2010. Defendant ONEOK Energy Services Company filed a Reply (Doc. #1951) on June 28, 2010.

I. BACKGROUND

This Multi District Litigation ("MDL") arises out of the energy crisis of 2000-2001. During that time, the national energy and natural gas markets became mutually dysfunctional, and, feeding off each other spiraled into a nationwide energy crisis. *Amendments to Blanket Sales Certificates*, 105 F.E.R.C. ¶ 61,217, at ¶ 12 (2003). The Federal Energy Regulatory Commission ("FERC") undertook a fact finding investigation of the market crisis in which it concluded that "spot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market." *Id.* FERC found the dysfunctions in the natural gas market stemmed from efforts to manipulate price indices compiled by private trade publications, including reporting of false data and wash trading.[1] *Id.*

Plaintiffs seek to recover damages on behalf of natural gas purchasers, alleging Defendants engaged in anti-competitive activities with the intent to manipulate and artificially increase the price of natural gas for consumers. Specifically, Plaintiffs allege Defendants conspired to knowingly deliver false reports concerning trade information to price indices and engaged in wash trades. In some of these cases, Plaintiffs bring only state law claims.[2]

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[1] A "wash trade" is a prearranged offsetting trade of the same product between the same parties, which involves no net change in ownership and no economic risk. Such trades create a false price for use in indices. *Amendments to Blanket Sales Certificate*, 105 F.E.R.C. ¶ 61,217, ¶ 38, ¶ 53.

[2] *Learjet, et al. v. ONEOK, Inc., et al., Heartland Regional Medical Center, et al. v. ONEOK, Inc., et al., Breckenridge Brewery of Colorado, LLC, et al. v. ONEOK, Inc., et al.,*

In others, Plaintiffs bring both state and federal claims.[3]

Defendants previously moved to dismiss Plaintiffs' Complaints in *J.P. Morgan Trust Company, N.A. v. Williams Companies, Inc.*[4] and *Learjet v. ONEOK, Inc.*, arguing the Natural Gas Act ("NGA") preempted Plaintiffs' state law claims under the doctrines of field and conflict preemption. In separate Orders, the Court suggested FERC's exclusive jurisdiction over the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales, may preempt Plaintiffs' state law claims. (Order (Doc. #448) at 6-16; Order (Doc. #547) at 6-11.) In *J.P. Morgan*, the Court dismissed Plaintiffs' claims as preempted understanding that Plaintiffs conceded Defendants participated in the interstate natural gas market and FERC therefore had exclusive jurisdiction over Defendants' alleged misconduct in the wholesale natural gas market. (Order (Doc. #448) at 15-16.) The Court later reconsidered this ruling based on Plaintiffs' clarification that in fact they did not concede the factual question of Defendants' participation in the

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Reorganized FLI, Inc. v. Williams Companies Inc., et al., Arandell Corp., et al. v. Xcel Energy, Inc., et al., Arandell Corp., et al. v. CMS Energy Corp., et al., and *NewPage Wisconsin System, Inc. v. CMS Energy Resource Management Co., et al.*

[3] *Sinclair Oil Corporation v. e-Prime, Inc. and Excel Energy Inc., Multiut Corporation v. Dynegy, Inc., et al.*, and *Sinclair Oil Corporation v. OneOK Energy Services Company, L.P.*

[4] The plaintiff in this action since has been re-designated as Reorganized FLI, Inc.

interstate market during the relevant time period. (Order (Doc. #548) at 4-9.) In *Learjet*, the Court ruled that FERC's exclusive jurisdiction may preempt Plaintiffs' claims but it was not clear from the face of the Amended Complaint that Defendants engaged in jurisdictional sales during the relevant time period, and, on a motion to dismiss, the Court had to construe the Amended Complaint in Plaintiffs' favor. (Order (Doc. #547) at 12-25.)

Defendants thereafter moved for summary judgment, contending Plaintiffs' claims against them are federally preempted under the doctrines of field and conflict preemption. Defendants relied on the Court's previous Orders indicating federal preemption would bar Plaintiffs' claims if Defendants were jurisdictional sellers, i.e., natural gas companies engaged in sales for resale within FERC's jurisdiction. Defendants proffered evidence they engaged in jurisdictional sales during the relevant time period identified in the Complaints. Defendants therefore argued they were entitled to summary judgment because they were natural gas companies subject to FERC's exclusive jurisdiction during the relevant time period, and consequently, Plaintiffs' claims are preempted. Plaintiffs responded that based on decisions from the United States Court of Appeals for the Ninth Circuit following the Court's prior Order, the Court was required to take a transactional view to determine whether Plaintiffs' claims involved conduct falling within FERC's jurisdiction.

In ruling on Defendants' motion for summary judgment, this Court held that "[i]f either the injury-causing transaction or the alleged market

manipulation occurred within FERC's jurisdiction, Plaintiffs' claims would be preempted." (Order (Doc. #1025) at 14.) However, where FERC does not have jurisdiction over either the injury-causing sale or the manipulative conduct, FERC lacks jurisdiction and therefore cannot preempt state law. (*Id.*) The Court also noted that "[m]any entities engage in both jurisdictional and non-jurisdictional sales. That FERC has jurisdiction over entities engaged in jurisdictional sales does not mean FERC has exclusive jurisdiction over those companies' conduct in non-jurisdictional transactions." (*Id.* at 16.)

Finally, the Court held that viewing the facts in the light most favorable to Plaintiffs, "it is possible that Plaintiffs may be able to prove Defendants conspired to control natural gas rates and engaged in manipulative conduct in non-jurisdictional transactions, including wash trades and false reporting of retail and first sale rates to price reporting indices" and that Plaintiffs purchased natural gas at the artificial rates in non-jurisdictional transactions. (*Id.* at 17.) "In such circumstances, FERC would have no jurisdiction over either the injury-causing transaction or the transactions in which Defendants engaged in the alleged misconduct." (*Id.*) The Court therefore denied Defendants' motions for summary judgment because "Defendants' status as jurisdictional sellers during the relevant time period does not preclude the possibility that Defendants engaged in manipulative conduct in non-jurisdictional transactions, such as providing false price reports on non-jurisdictional transactions to trade indices, falling outside FERC's exclusive jurisdiction." (*Id.*)

Defendants moved the Court to reconsider its prior Order, arguing that under the NGA, FERC has jurisdiction over any practice by a jurisdictional seller which affects a jurisdictional rate. Defendants argued that because any alleged false price reports were reported to a common index, all false price reporting affected the jurisdictional rate, regardless of whether the false report itself was linked to jurisdictional or non-jurisdictional activity. Plaintiffs opposed the motion, arguing Defendants' position was foreclosed by the Ninth Circuit's decision in *E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027 (9th Cir. 2007), which Plaintiffs contended already rejected Defendants' preemption arguments. Plaintiffs also asserted that Defendants' argument would extend FERC jurisdiction in such a manner as to defeat the dual regulatory scheme envisioned by Congress by expanding FERC jurisdiction over any practice, even non-jurisdictional conduct, which would affect a jurisdictional rate.

The Court granted Defendants' motion to reconsider, holding that pursuant to 15 U.S.C. § 717d, FERC has jurisdiction to regulate any practice by a jurisdictional seller affecting a rate charged or collected by a jurisdictional seller in connection with the transportation or sale of natural gas within FERC's jurisdiction. (Order (Doc. #1844) ("November 2, 2009 Order").) Because FERC's jurisdiction has preemptive force where it exists, if FERC has jurisdiction over a jurisdictional seller's practices that affect jurisdictional rates, that jurisdiction is exclusive and preempts state law on the subject. The Court thus held that "if Defendants were jurisdictional sellers and their alleged practices

of false price reporting and wash trades were practices which directly affected a jurisdictional rate, the practices fall within FERC's exclusive jurisdiction, and Plaintiff's claims therefore will be preempted." (*Id.* at 9.) The Court directed Defendants to re-file their motions for summary judgment, along with any supplementation. (*Id.* at 10.)

Defendants now move for summary judgment[5] or partial summary judgment in the remaining cases in this MDL. Defendants contend no genuine issue of material fact remains that they were jurisdictional sellers whose alleged practices of false price reporting and wash trades directly affected a jurisdictional rate because jurisdictional rates were set by reference to the indices which Plaintiffs allege Defendants manipulated. Specifically, Defendants contend they each were affiliated with a pipeline or local distribution company and sold gas for resale where such gas was not produced by said pipeline, local distribution company, or any affiliate. Defendants contend these sales for resale fall within FERC's exclusive jurisdiction, and thus they were jurisdictional sellers. Defendants argue that Plaintiffs' allegations that Defendants engaged in conduct that manipulated the price indices, taken as true solely for purposes of this motion, such conduct constitutes practices that would have directly affected any rate set using the indices. Finally, Defendants contend no genuine issue of material fact

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[5] Because the preemption doctrine impacts only state law claims, Defendants' motions are not directed at the federal antitrust claims which Plaintiffs have alleged in some of these MDL actions.

remains that jurisdictional rates were set using the price indices which Defendants allegedly manipulated. Defendants thus contend their alleged practices of false price reporting and wash trades directly affected a jurisdictional rate, and fall within FERC's exclusive jurisdiction.

Plaintiffs respond by seeking reconsideration of the Court's November 2, 2009 Order, and arguing their state law claims are not preempted. Plaintiffs further contend that false price reporting and wash trades are not "practices" as contemplated by § 717d because they are not traditional, habitual acts on the part of a natural gas company. Plaintiffs also argue Defendants' conduct did not directly affect a jurisdictional rate. Rather, Defendants conduct was aimed at the indices, which are not jurisdictional rates. Plaintiffs also take issue with Defendants' means of proof at the summary judgment stage. Plaintiffs contend Defendants cannot rely upon Plaintiffs' pleadings to establish no genuine issue of material fact remains and Defendants' supporting declarations are conclusory or the declarants lack personal knowledge of certain facts stated therein.

II. LEGAL STANDARD

Summary judgment is appropriate if the "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is "material" if it might affect the outcome of a suit, as determined by the governing substantive

law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Initially, the moving party bears the burden of proving there is no genuine issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). After the moving party meets its burden, the burden shifts to the non-moving party to produce evidence that a genuine issue of material fact remains for trial. *Id.* The Court views all evidence in the light most favorable to the non-moving party. *Id.*

Reconsideration of a prior ruling is appropriate only in limited circumstances, such as the discovery of new evidence, an intervening change in controlling law, or where the initial decision was clearly erroneous or manifestly unjust. *Nunes v. Ashcroft*, 375 F.3d 805, 807-08 (9th Cir. 2004). A motion for reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court already has ruled. *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000).

III. DISCUSSION

A. Reconsideration

Plaintiffs request the Court reconsider its November 2, 2009 ruling that § 717d preempts any state law claim that conflicts with FERC's exclusive jurisdiction over any practice by a jurisdictional seller that directly affects a jurisdictional rate.[6]

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[6] The Court recognizes that some Plaintiffs, such as the Wisconsin-based Plaintiffs, have not previously briefed the

Plaintiffs' arguments generally are a rehashing of arguments this Court already has addressed, and the Court finds no basis to alter its November 2, 2009 Order. It suffices to say that while Plaintiffs are correct that FERC has no jurisdiction over Plaintiffs' non-jurisdictional transactions, FERC does have exclusive jurisdiction over any practice by a jurisdictional seller that directly affects a jurisdictional rate. Because FERC's jurisdiction is exclusive where it exists, any state law claims based on any such practices are preempted, even if that means Plaintiffs are left without a state law remedy. (*See* Orders (Doc. #448, #547, #1844).) Victims of anti-competitive conduct are not left completely without a remedy, as federal remedies exist.

Plaintiffs have failed to support their collateral estoppel argument because they have presented no evidence that any Defendant or its privy in this action is subject to a final judgment in which the preemption issue presently under consideration was decided against that Defendant or its privy in a prior action. The fact that a Defendant or its privy may have lost rulings during the course of a case does not suffice to support collateral estoppel unless there is a final judgment and the issue on which Plaintiffs seek to estop Defendants was actually litigated and necessary to support the judgments. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

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preemption question, as Defendants' prior motions for summary judgment were filed only in *JPMorgan* and *Learjet*. The Court considers these Plaintiffs' arguments under the usual summary judgment standard, rather than as a motion for reconsideration, but finds no basis to deviate from the reasoning set forth in the November 2, 2009 Order in these cases.

Further, the Court previously has explained that the United States Court of Appeals for the Ninth Circuit did not address this precise preemption issue in *Gallo*. (Order (Doc. #1844) at 5.)

Plaintiff Multiut Corporation's reliance on *In re NOS Communications, MDL No. 1357* is unfounded, as that case dealt with the filed rate doctrine and complete preemption, and neither doctrine is applicable to the present preemption question. 495 F.3d 1052 (9th Cir. 2007). The Court also rejects Plaintiff Sinclair Oil Corporation's argument that its contractual choice-of-law provision in favor of Oklahoma law overrides federal preemption principles. Because Oklahoma law includes federal law, federal preemption principles control. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 & n.12 (1982) (stating "a fundamental principle in our system of complex national polity mandates that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution" (quotation omitted)). Further, the Court reiterates that Sinclair Oil Corporation's contracts with ONEOK Energy Services Company, L.P.'s ("ONEOK") are not subject to FERC's jurisdiction. Thus, for example, if Sinclair Oil Corporation brought a breach of contract claim against ONEOK based on ONEOK's alleged failure to deliver the agreed upon volume of natural gas, FERC would have no jurisdiction over the dispute even if the price at which that gas was sold was the result of ONEOK's participation in a conspiracy to manipulate the indices from which both jurisdictional and non-jurisdictional rates are

determined. Such a claim would not implicate the alleged practice of manipulating a jurisdictional rate.

B. Jurisdictional Sellers

Defendants contend no genuine issue of material fact remains that Defendants are jurisdictional sellers because they are affiliated with a pipeline or local distribution company and sold gas for resale which was not produced by said pipeline, local distribution company, or any affiliate. Defendants provide in support various affidavits and records purporting to show affiliation and sales of gas not produced by affiliated entities. Plaintiffs respond by challenging Defendants' evidentiary production, arguing that Defendants make only conclusory averments of affiliation. Plaintiffs also contend that affiliation under the pertinent law is determined by control, and in prior briefing in these MDL proceedings, certain Defendants have denied they controlled other Defendants. Plaintiffs also dispute the showing in some instances of whether certain gas sales were jurisdictional because Defendants have failed to show the sales were for unaffiliated gas and Defendants made no accounting for gas from Canada or Mexico.

Pursuant to the NGA, FERC has jurisdiction over "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b). However, Congress has removed "first sales" from FERC's jurisdiction. 15 U.S.C. § 3431(a)(1)(A); Gallo, 503 F.3d at 1037. Despite a rather complex

statutory definition,[7] first sales are "in essence, merely sales of natural gas that are not preceded by a sale to an interstate pipeline,[8] intrastate pipeline,[9] local distribution company,[10] or retail

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[7] (A) General rule

The term "first sale" means any sale of any volume of natural gas-

(i) to any interstate pipeline or intrastate pipeline;

(ii) to any local distribution company;

(iii) to any person for use by such person;

(iv) which precedes any sale described in clauses (i), (ii), or (iii); and

(v) which precedes or follows any sale described in clauses (i), (ii), (iii), or

(vi) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this chapter.

(B) Certain sales not included

Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

15 U.S.C. § 3301(21).

[8] An interstate pipeline means any person engaged in natural gas transportation subject to FERC's jurisdiction. 15 U.S.C. § 3301(15).

[9] An intrastate pipeline means any person engaged in natural gas transportation, not including gathering, which is not subject to FERC's jurisdiction. 15 U.S.C. § 3301(16).

[10] A local distribution company is any person other than a pipeline, engaged in the transportation or local distribution of

customer. In other words, sales by pipelines, local distribution companies, and their affiliates cannot be first sales unless these entities are selling gas of their own production." *Gallo*, 503 F.3d at 1037. Thus, FERC's jurisdiction under the NGA "includes all sales for resale by interstate and intrastate pipelines and [local distribution companies] and their affiliates, other than their sales of their own production." *National Association of Gas Consumers v. All Sellers of Natural Gas in the United States of America in Interstate Commerce*, 106 F.E.R.C. ¶ 61,072, ¶ 61248 (Jan. 29, 2004).

The importation of Canadian and Mexican natural gas also constitutes a first sale. 15 U.S.C. § 717b(b)(1) ("With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas . . . the importation of such natural gas shall be treated as a 'first sale' within the meaning of section 3301(21) of this title"). However, imported gas does not retain "first sale" status regardless of whether the transaction at issue constitutes a "first sale" under the statutory definition. *Pacific Interstate Transmission Company*, 66 F.E.R.C. ¶ 61,369, ¶ 62,227 (Mar. 30, 1994). Rather, as FERC has explained, Congress intended to "treat[] the international border as the equivalent of a wellhead." *Id.* ¶ 62,228. Because Congress defined importation of such gas as a "first sale," a statutorily defined term, and because Congress also specifically

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natural gas and the sale of natural gas for ultimate consumption. 15 U.S.C. § 3301(17).

prohibited preferential treatment for such gas,[11] imported gas from Mexico or Canada does not retain "first sale" status unless it otherwise meets the statutory definition of a first sale. *Id.* ¶¶ 62,227-29.

An affiliate, "when used in relation to any person, means another person which controls, is controlled by, or is under common control with such person." 15 U.S.C. § 3301(27). Under pertinent regulations in effect during the relevant time period, control "include[d], but [was] not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company. A voting interest of 10 percent or more create[d] a rebuttable presumption of control." 18 C.F.R. § 161.2(b) (2000).

FERC interpreted control to mean the ability to exercise control. *Iroquois Gas Transmission Sys., L.P.*, 78 F.E.R.C. ¶ 61,108, ¶ 61,377, ¶ 61,379 (Feb. 4, 1997) (holding one of ten owners had control where partner could cast a negative vote on proposals that required a seventy-five percent majority, even though day-to-day operations were controlled by an independent management company); *Kern River Gas Transmission Co.*, 67 F.E.R.C. ¶ 61,027, ¶ 61,089 (Apr. 6, 1994) (concluding that each partner had control where general partnership agreement had a unanimous approval requirement because each partner had "veto power over any decision by simply withholding its vote"). The United States Court of

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[11] "[T]he Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis." 15 U.S.C. § 717b(b)(2).

Appeals for the D.C. Circuit likewise indicated the question was not whether actual control was exercised, but whether the "management structure or some incompatibility of economic interests" rebutted the presumption that persons with ten percent or more ownership interests could, acting alone or in conjunction with others, exercise the authority to direct or cause the direction of the management or policies of a company. *Tenneco Gas v. F.E.R.C.*, 969 F.2d 1187, 1212-13 (D.C. Cir. 1992). Thus, while evidence of actual control would provide powerful evidence of authority to control, evidence of the exercise of that authority is not required to establish affiliate status.

1. Dynegy Defendants

During the relevant time period, Defendant Dynegy Marketing and Trade ("DMT") was a wholly owned subsidiary of Defendant Dynegy, Inc. ("Dynegy"). (Defs.' Joint Appx. in Support of Renewed Mot. & Mot. for Summ. J. Based on Fed. Preemption (Doc. #1882) ["Jt. Appx."], Ex. 3-A at ¶ 9.) In November 1999, Dynegy acquired Illinova Corporation and its wholly-owned subsidiary, Illinois Power Company, a local distribution company which provided retail natural gas service to 400,000 customers in Illinois. (*Id.* ¶ 11 & Attachs. A, B.) Dynegy indirectly wholly owned Illinois Power Company until 2004. (*Id.* ¶¶ 12-13 & Attach. B.) Because Dynegy wholly owned both DMT and indirectly wholly owned Illinois Power Company during the relevant period, DMT was under common control with a local distribution company.

DMT was a natural gas marketer which bought natural gas and resold it to other gas marketers,

local utilities, and others. (Jt. Appx., Ex. 3-A at ¶ 10.) DMT did not produce natural gas during the relevant period. (*Id.* ¶ 14.) Rather, during the relevant period, DMT sold gas from various third party suppliers, none of which were affiliated with DMT, including Anadarko Energy Services Company ("Anadarko"); Altrade Transaction, L.L.C. ("Altrade"), El Paso Merchant Energy, L.P. (currently known as El Paso Marketing, L.P.), Sempra Energy Trading Corp. ("SET"), and Southern Company Energy Trading ("Southern"). (*Id.* ¶ 16.) DMT sold the gas it purchased from unaffiliated third parties to various other unaffiliated third parties, including SET, AEP Energy Services, Inc. ("AEPES"), and El Paso Merchant Energy, L.P. (*Id.* ¶ 17.) SET, AEPES, and El Paso Merchant Energy L.P. resold all of the gas they purchased during the relevant period. (Jt. Appx., Exs. 8-E, 8-G, 8-H.) DMT thus has established no genuine issue of material fact remains that it made sales for resale of natural gas other than its own or its affiliates' production, and was a jurisdictional seller.

Plaintiffs[12] make two attacks on the Dynegy Defendants' proffer of evidence. First, Plaintiffs argue the Dynegy Defendants offer no evidence Dynegy exercised actual control over DMT or Illinois Power Company. However, as the Court stated above, the applicable regulations at the time

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[12] Plaintiff Multiut Corporation states that it "cannot dispute that Dynegy engaged in the conduct which Dynegy claims provide it with immunity from fraud, i.e., stock ownership in Illinois Power (a local distribution company) . . . ." (Multiut Corporation's Opp'n to Dynegy Inc. & Dynegy Marketing & Trade's Mot. for Partial Summ. J. at 2.)

required only the authority to control, and a ten percent ownership interest creates a rebuttable presumption of such authority. The Dynegy Defendants have presented evidence that Dynegy directly wholly owned DMT, and indirectly wholly owned Illinois Power Company. The Dynegy Defendants thus have raised the rebuttable presumption of authority to control, and Plaintiffs have presented no evidence to suggest Dynegy did not have the authority to control either of its wholly owned subsidiaries.

Second, Plaintiffs contend that the affiant, Victor Cabrera, upon which the Dynegy Defendants rely to prove sales for resale lacks personal knowledge as to whether the entities to which DMT sold natural gas resold the gas. However, the Dynegy Defendants have presented other affidavits from persons with knowledge from the entities to which DMT sold gas indicating that all gas those entities purchased was for resale. Consequently, Defendants have established no genuine issue of material fact remains that DMT was affiliated with a local distribution company, and it made sales for resale other than its own or its affiliates' production. No genuine issue of material fact remains that DMT was a jurisdictional seller during the relevant time period.

2. Coral Energy Resources, L.P.

During the relevant period, Defendant Coral Energy Resources, L.P. ("Coral") was ninety-nine percent owned by Coral Energy Holding, L.P. ("CEP"). (Supp. Joint Appx., Ex. 53 at ¶ 4.) According to Robert Reilley ("Reilley"), Vice President of Regulatory Affairs for Shell Energy North America (US) L.P., CEH in turn was indirectly

wholly-owned by "Shell" from January 1, 2000 through December 2000, and thereafter, "Shell" indirectly owned 90.4% of CEH. (*Id.*) Reilley defines "Shell" as "Shell Oil Company and/or Royal Dutch Shell." (*Id.* ¶ 2.)

Reilley also states that during this same period, other "Shell" owned entities were or owned natural gas pipelines. (Jt. Appx. Ex. 43 ¶ 3; Supp. Jt. Appx., Ex. 53 at ¶¶ 2-4.) For example, Reilley states that "Shell" indirectly owned over 10% interests in Shell Gas Pipeline Company; Shell Gas Transmission LLC; Mississippi Canyon Gas Pipeline, LLC; Garden Banks Gas Pipeline, LLC; Manta Ray Offshore Gathering Company; Nautilus Pipeline Company LLC; Stingray Pipeline, LLC; Starfish Pipeline Company, LLC; Tejas Gas LLC; and Tejas Gas Pipeline, L.P. (Supp. Jt. Appx., Ex. 53 at ¶ 4.) Because Reilley refers to two companies as "Shell," and does not identify which Shell company owns what interests in Coral and the other companies identified, Reilley's affidavit does not establish that Coral and any of the identified pipeline companies are under common control.

Coral also attempts to show pipeline affiliation through FERC orders. The first FERC order states that Mississippi Canyon Gas Pipeline LLC formerly was known as Shell Gas Pipeline Company. (Jt. Appx., Ex. 6-A, Ex. A.) However, the mere fact that a pipeline had the word "Shell" in its name does not support a finding of affiliation. Coral presents no evidence of the ownership structure of either Mississippi Canyon Gas Pipeline LLC or Shell Gas Pipeline Company, nor ties that ownership structure to Coral. The second FERC order states that

Starfish Pipeline Company, LLC ("Starfish") purchased Stingray Pipeline Company, LLC from Deepwater Holdings, LLC. (Jt. Appx., Ex. 6-A, Ex. B.) The FERC order further states that Starfish is owned equally by Shell Gas Transmission, LLC and Enterprise Products Operating, L.P. (*Id.*) Again, however, the mere mention of "Shell" in a company's name does nothing to establish affiliation. Coral has provided no evidence of the corporate structures and ownership interests between Coral, "Shell," and these other entities sufficient to establish affiliation.

Coral also cites to *City of Moundridge, KS v. Exxon Mobil Corp.* as an example of a court case finding Coral is subject to FERC jurisdiction. 471 F. Supp. 2d 20, 44 (D.D.C. 2007). However, Coral has not provided this Court with the evidence supporting that conclusion, and it appears the court in *City of Moundridge* was evaluating a different relevant time period.

Although the above showings are insufficient, Coral was the subject of several FERC orders in which FERC exercised jurisdiction over Coral during the relevant time period for the very conduct at issue in this case. In April 2003, FERC directed Coral and several other companies to "demonstrate that they have fixed their internal processes for reporting trading data to the trade press or that they no longer sell natural gas at wholesale." *Order Directing Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 103 F.E.R.C. ¶ 61,089, ¶ 61,286 (Apr. 30, 2003). Coral responded to this direction by indicating that it was continuing to report price information to index publishers, that it had in place a code of conduct for price reporting,

and that it had not disciplined any employees because it had determined none of its employees had engaged in false price reporting. *Order Accepting Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 104 F.E.R.C. ¶ 61,153, ¶ 61,544 (July 29, 2003). In March 2005, FERC and Coral entered into a stipulation and consent agreement related to Coral's alleged manipulation of natural gas prices pursuant to which Coral paid $3.5 million to an organization providing assistance to low-income energy consumers. *Order Approving Stipulation and Consent Agreement*, 110 F.E.R.C. ¶ 61,205, ¶ 61,768 (Mar. 3, 2005). In this order, FERC noted its jurisdiction was based on wholesale sales of natural gas. *Id.*

FERC's actual exercise of jurisdiction over Coral during the relevant time period for the same conduct at issue in this case is evidence that Coral was a jurisdictional seller. Plaintiffs have not presented any evidence that Coral was not a jurisdictional seller during the relevant time frame. No genuine issue of material fact remains that Coral was a jurisdictional seller during the relevant time period.

3. AEP Defendants

During the relevant time period, Defendant AEP Energy Services, Inc. ("AEPES") was an indirect wholly owned subsidiary of Defendant American Electric Power Co. ("AEP"). (Jt. Appx., Ex. 46 at ¶ 2.) In January 2005, FERC entered into a stipulation and consent agreement with AEP and two of its subsidiaries, AEPES and American Electric Power Service Corporation, in relation to preferences AEP's pipelines gave to their "affiliated marketer," AEPES. (Jt. Appx., Ex. 26, Attach. C.)

In April 2003, FERC directed AEP and several other companies to "demonstrate that they have fixed their internal processes for reporting trading data to the trade press or that they no longer sell natural gas at wholesale." *Order Directing Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 103 F.E.R.C. ¶ 61,089, ¶ 61,286 (Apr. 30, 2003). In response, AEPES, AEP Power Marketing, Inc., and AEP Service Corporation reported that they intended to continue to report transactions to the indices, and would do so consistent with FERC's Policy Statement on price reporting. *Order Accepting Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 104 F.E.R.C. ¶ 61,153, ¶ 61,544 (July 29, 2003); (Jt. Appx., Ex. 26, Attachs. A, B.)

FERC's actual exercise of jurisdiction over the AEP Defendants during the relevant time period for the same conduct at issue in this case is evidence that the AEP Defendants were jurisdictional sellers. Plaintiffs have not presented any evidence that the AEP Defendants were not jurisdictional sellers during the relevant time frame. Instead, Plaintiffs argue that AEP previously took the position that AEP did not exercise control over AEPES. However, as discussed above, affiliate status is determined by having the authority to control, not the actual exercise of such authority. No genuine issue of material fact remains that AEPES was a jurisdictional sellers during the relevant time period.

4. Reliant Defendants

During the relevant time period, Reliant Energy Services, Inc. ("RES") was the wholly owned

subsidiary of Reliant Energy Inc. ("REI").[13] (Jt. Appx., Ex. 9-A at ¶ 2.) In October 2003, FERC entered into a stipulation and consent agreement with Reliant Energy Services, Inc.; Reliant Energy Coolwater, Inc.; Reliant Energy Ellwood, Inc.; Reliant Energy Etiwanda, Inc.; Reliant Energy Mandalay, Inc.; and Reliant Energy Ormand Beach Inc. regarding, among other things, issues raised in FERC's Final Report on Price Manipulation in Western Markets. *Order Approving Stipulation and Consent Agreement*, 105 F.E.R.C. ¶ 61,008 (Oct. 2, 2003.) In the order approving the stipulation and consent agreement, FERC concluded it had jurisdiction over RES due in part to "trading in the wholesale gas market." *Id.* ¶ 61,016. Specifically, FERC concluded it had "jurisdiction over Reliant's trades at Topock and has exercised that jurisdiction in reviewing such trades." *Id.* FERC stated that "Reliant's trading at Topock on EnronOnline ('EOL') constituted trading in the wholesale market and was undertaken pursuant to a blanket marketing certificate issued by the Commission. . . . During 2000 and 2001, Reliant was an affiliate of an interstate pipeline and thus its sales were not 'first sales . . . .'" *Id.*

FERC's actual exercise of jurisdiction over RES during the relevant time period for the same conduct at issue in this case is evidence that RES was a jurisdictional seller. Plaintiffs have not presented any evidence that the RES was not a jurisdictional seller during the relevant time frame. Instead, Plaintiffs argue that REI previously took the position

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[13] The Court previously has detailed REI's formation from former REI and Reliant Resources, Inc. (Order (Doc. #1515).)

that it did not exercise control over RES. However, as discussed above, affiliate status is determined by having the authority to control, not the actual exercise of such authority. No genuine issue of material fact remains that the RES was a jurisdictional seller during the relevant time period.

5. ePrime Defendants

From January 1, 2000 through August 2000, New Century Energies, Inc. ("New Century") was a public utility holding company. (Jt. Appx., Ex. 7-A at ¶ 1.) In August 2000, New Century merged with Northern States Power Company, and the new entity changed its name to Xcel Energy Inc. ("Xcel"). (*Id.* ¶ 2.) Prior to the merger, Defendant ePrime, Inc. ("ePrime") was a wholly owned subsidiary of NC Enterprise, Inc., which was a wholly owned subsidiary of New Century. (*Id.* ¶ 3.) ePrime subsequently became the wholly owned subsidiary of Xcel Energy Markets Holdings Inc., which in turn was wholly owned by Defendant Xcel. (Jt. Appx., Ex. 7-B at ¶ 2.) Xcel also owned all outstanding shares of Northern States Power Co. (Wisconsin), a local distribution company. (Request for Judicial Notice[14] (Doc. #1917), Ex. A at 3, 7.) New Century was not a producer of natural gas, nor were any of its subsidiaries, including ePrime. (Jt. Appx., Ex. 7-A at ¶¶ 5-6.) During the relevant time period, all sales ePrime made were to

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[14] The Court takes judicial notice of the fact of the SEC filing, but does not take judicial notice of the truth of the facts stated therein. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). However, the SEC filing is signed pursuant to the requirements of the Securities Exchange Act of 1934, and the Court will consider the statements therein as evidence of the asserted facts.

utilities or others for resale. (Jt. Appx., Ex. 7-B at ¶ 6.)

Defendants ePrime and Xcel have presented evidence that ePrime was affiliated with a local distribution company and made sales for resale which were not of its own or its affiliates' production. Plaintiffs do not challenge any of this evidence except whether Defendants adequately established ePrime is affiliated with a local distribution company. However, Defendants have presented evidence that ePrime was affiliated with Northern States Power Co., a local distribution company in Wisconsin, as both ePrime and Northern States Power Co. were directly or indirectly wholly owned by Xcel. No genuine issue of material fact remains that ePrime was a jurisdictional seller during the relevant period.

6. El Paso Defendants

During the relevant period, El Paso Corporation indirectly owned 100% of the voting and equity interest in El Paso Marketing, L.P., which during that time was known as El Paso Merchant Energy, L.P. (Jt. Appx., Ex. 55 at ¶ 2.) During this same period of time, El Paso Corporation indirectly owned 100% of the voting and equity interest in El Paso Natural Gas Company, which was an interstate pipeline. (*Id.* ¶ 3.) El Paso Marketing, L.P. was in the business of marketing and trading natural gas, which it sold to third parties, such as AEPES, DMT, Enron North America Corporation, ONEOK Energy Marketing & Trading Company, L.P., RES, SET, and Southern California Gas Company. (Jt. Appx., Ex. 15-A at ¶¶ 6-8.) SET, DMT, Enron North America Corporation, and AEPES resold all of the gas they

purchased during the relevant period. (Jt. Appx., Exs. 8-B, 8-E, 8-I, 9-C.) RES, Southern, and ONEOK Energy Marketing & Trading Company, L.P. sold substantially all of the natural gas they purchased. (Jt. Appx., Exs. 8-A, 8-C, 8-H.) El Paso Marketing, L.P. obtained over 1,289,915,275 MMBtu of gas which was produced by its affiliates. (Jt. Appx., Ex. 15-A at ¶ 7.) El Paso Marketing L.P. sold 1,877,238, 602 MMBtu of gas to AEPES, DMT, Enron North America Corporation, and SET. (*Id.*) El Paso Marketing, L.P. thus sold more gas to these entities than El Paso Marketing L.P. obtained from its affiliates, and these entities resold all gas they purchased.

As with other Defendants, FERC exercised jurisdiction over El Paso Marketing L.P. by directing it to demonstrate that it had fixed its internal processes for reporting trading data to the trade press or that it "no longer" sold natural gas at wholesale. *Order Directing Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 103 F.E.R.C. ¶ 61,089, ¶ 61,286 (Apr. 30, 2003). El Paso Marketing L.P., then known as El Paso Merchant Energy, LP, responded by admitting that at least one of its employees provided inaccurate information to index publishers, and by indicating that it was going to shut down its trading operations. *Order Accepting Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 104 F.E.R.C. ¶ 61,153, ¶ 61,544 (July 29, 2003). FERC's exercise of jurisdiction over El Paso Marketing L.P. during the relevant period for the very conduct at issue in

this case is evidence that El Paso Marketing L.P. was a jurisdictional seller.

Defendant El Paso Marketing, L.P. has presented evidence that it was affiliated with a pipeline and made sales for resale which were not of its own or its affiliates' production. Plaintiffs do not challenge any of this evidence except whether El Paso Marketing, L.P. adequately established it was affiliated with a pipeline. However, Defendants have presented evidence that El Paso Marketing, L.P. was affiliated with El Paso Natural Gas Company, as both El Paso Marketing, L.P. and El Paso Natural Gas Company were indirectly wholly owned by El Paso Corporation. No genuine issue of material fact remains that El Paso Marketing, L.P. was a jurisdictional seller during the relevant period.

7. The Williams Defendants

During the relevant time period, Williams Power Company was a wholly owned subsidiary of Williams Merchant Services Company, Inc. (Supp. Jt. Appx., Ex. 56 at ¶ 4.) Williams Merchant Services Company was a wholly owned subsidiary of Williams Energy Services, LLC. (*Id.*) Williams Energy Services, LLC was a wholly owned subsidiary of The Williams Companies, Inc. (*Id.*) During the relevant time period, Williams Gas Pipeline Company was a wholly owned subsidiary of The Williams Companies, Inc. (*Id.*) Williams Gas Pipeline Company owned interstate pipelines, including three wholly-owned subsidiary pipeline companies, Transcontinental Gas Pipe Line Corporation, Northwest Pipeline Corporation, and Texas Gas Transmission Corporation. (*Id.*)

Williams Exploration & Production ("WEP") is a business unit of The Williams Companies, Inc. (Jt. Appx., Ex. 14-A at ¶ 5.) WEP produces natural gas. (*Id.*) During the relevant period, Williams Power Company obtained 373,257,814 MMBtu from WEP. (*Id.* ¶ 8.) Williams Power Company sold natural gas produced by WEP as well as gas produced by unaffiliated third parties. (*Id.* ¶ 6.) Williams Power Company made these sales to various third parties such as AEPES, DMT, Enron North America Corporation, SET, El Paso Merchant Energy, L.P., RES, and Southern. (Jt. Appx., Ex. 14-B at ¶ 4.) SET, DMT, Enron North America Corporation, El Paso Merchant Energy, L.P., and AEPES resold all of the gas they purchased during the relevant period. (Jt. Appx., Exs. 8-B, 8-E, 8-G, 8-I, 9-C.) RES, Southern, and ONEOK Energy Marketing & Trading Company, L.P. sold substantially all of the natural gas they purchased. (Jt. Appx., Exs. 8-A, 8-C, 8-H.) Williams Power Company sold more natural gas to these entities than it obtained from WEP during the relevant period. (Jt. Appx., Ex. 14-A at ¶ 8, Ex. 14-B at ¶ 4.) Consequently, Williams Power Company sold at least some natural gas for resale that was not its affiliate's production.

Defendant Williams Power Company has presented evidence that it was affiliated with a pipeline and made sales for resale which were not of its own or its affiliates' production. Plaintiffs do not challenge any of this evidence except whether Williams Power Company adequately established it was affiliated with a pipeline. However, Defendants have presented evidence that Williams Power Company was affiliated with Transcontinental Gas Pipe Line

Corporation, Northwest Pipeline Corporation, and Texas Gas Transmission Corporation, as all of these entities were indirectly wholly owned by The Williams Companies. Further, as discussed above, Defendants need not show The Williams Companies exercised actual control to show affiliation. No genuine issue of material fact remains that Williams Power Company was a jurisdictional seller during the relevant period.

8. The CMS Defendants

Defendant CMS Energy Corporation is a holding company which indirectly wholly owned two subsidiaries which engaged in trading of natural gas, CMS Marketing, Services and Trading ("MS&T") and CMS Field Services ("Field Services"). (Jt. Appx., Ex. 45 ¶¶ 6-7.) MS&T was a wholly owned subsidiary of CMS Enterprises Company. (Supp. Jt. Appx., Ex. 54 at ¶ 5.) CMS Enterprises Company was a wholly-owned subsidiary of CMS Energy Corporation. (*Id.* ¶ 9.) Field Services was a wholly owned subsidiary of CMS Gas Transmission Company. (*Id.* ¶ 6.) CMS Gas Transmission Company wholly owned Panhandle Eastern Pipe Line Company, which owned and operated a natural gas pipeline network. (*Id.* ¶ 7.) During the relevant period, CMS Gas Transmission Company was a wholly-owned subsidiary of CMS Enterprises Company. (*Id.* ¶ 8.) Additionally, CMS Energy Corporation wholly owned Consumers Energy Company, a local distribution company located in Michigan. (*Id.* ¶ 10.)

Although CMS Marketing Services purchased gas from an affiliate named CMS Oil & Gas, none of that gas was sold on the Trunkline pipeline. (Jt. Appx., Ex. 44 at ¶ 4, ¶ 8.) MS&T did not produce natural

gas, and the only affiliated gas it purchased was from CMS Oil & Gas. (*Id.* ¶¶ 10-11.) MS&T purchased over 29 million MMBtu from CMS Oil & Gas. (*Id.* ¶ 12.) During that same period, MS&T sold more than 1.6 billion MMBtu, and thus it sold more gas than it purchased from an affiliate. (*Id.* ¶¶ 13-14.) MS&T sold gas to AEPES, DMT, El Paso Merchant Energy, L.P., and Enron North American Corp. on the Trunkline pipeline. (*Id.* ¶ 15.) DMT, Enron North America Corporation, El Paso Merchant Energy, L.P., and AEPES resold all of the gas they purchased during the relevant period. (Jt. Appx., Exs. 8-B, 8-G, 8-I, 9-C.)

Additionally, as with some of the other Defendants previously discussed, FERC exercised jurisdiction over MS&T, directing it to demonstrate that it had fixed its internal processes for reporting trading data to the trade press or that it "no longer" sold natural gas at wholesale. *Order Directing Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 103 F.E.R.C. ¶ 61,089, ¶ 61,286 (Apr. 30, 2003). MS&T responded by admitting that at least one of its employees provided inaccurate information to index publishers, and by indicating that it was going to shut down its trading operations. *Order Accepting Submission of Information with Respect to Internal Processes for Reporting Trading Data*, 104 F.E.R.C. ¶ 61,153, ¶ 61,544 (July 29, 2003). FERC's exercise of jurisdiction over MS&T during the relevant period for the very conduct at issue in this case is evidence that MS&T was a jurisdictional seller.

Field Services did not produce natural gas and did not purchase gas from any affiliated entity.

(Jt. Appx., Ex. 44 at ¶ 21-22.) Field Services sold gas to AEPES, DMT, El Paso Merchant Energy, L.P., and SET. (*Id.* ¶ 23.) DMT, El Paso Merchant Energy, L.P., and AEPES resold all of the gas they purchased during the relevant period. (Jt. Appx., Exs. 8-B, 8-G, 8-I.)

Defendants have presented evidence that MS&T and Field Services were affiliated with a pipeline and a local distribution company, and made sales for resale which were not of their own or their affiliates' production. Plaintiffs do not challenge any of this evidence except whether MS&T or Field Services adequately established they were affiliated with a pipeline or local distribution company. However, Defendants have presented evidence that MS&T and Field Services were affiliated with Panhandle Eastern Pipe Line Company and Consumers Energy Company, as all of these entities were indirectly wholly owned by CMS Energy Corporation. Further, as discussed above, Defendants need not show CMS Energy Corporation exercised actual control to show affiliation. No genuine issue of material fact remains that MS&T and Field Services were jurisdictional sellers during the relevant period.

9. Duke Energy Defendants

Duke Energy Carolinas, LLC was formerly known as Duke Energy Corporation ("DEC"). (Jt. Appx., Ex. 4-A at ¶ 1.) DEC was formed in 1997 through a merger between Duke Power Company, a local electric utility, and PanEnergy Corporation, which owned subsidiaries that operated interstate natural gas pipelines. (*Id.* ¶ 2.) During the relevant period, DEC indirectly owned the entire ownership interest in the interstate and intrastate pipelines Texas

Eastern Transmission, Algonquin Gas Transmission, and East Tennessee Natural Gas. (*Id.* ¶ 6.) None of these pipelines, or their subsidiaries or affiliates, produced natural gas. (*Id.*) DEC also was affiliated with Duke Energy Hydrocarbons LLC, which invested in oil and gas exploration prospects, but did not produce natural gas during the relevant period. (*Id.* ¶ 9.)

DEC indirectly owned a sixty percent interest in Duke Energy Trading and Marketing, L.L.C. ("DETM"), which marketed natural gas in the United States. (*Id.* ¶¶ 4-5.) ExxonMobil Corporation ("ExxonMobil") indirectly owned the other forty percent interest in DETM. (*Id.*) Neither DEC nor DETM produced natural gas. (*Id.* ¶¶ 3, 5.) ExxonMobil, however, may have had subsidiaries which produced natural gas which was sold to DETM, which DETM subsequently resold. (*Id.* ¶ 10.) Other than ExxonMobil subsidiaries and Duke Energy Hydrocarbons, LLC, no other entities affiliated with DEC, DETM, or the pipelines produced natural gas or acquired natural gas from gas-producing wells in which they had invested. (*Id.* ¶ 11.)

During the relevant period, DETM purchased 885,322,125 MMBtu of natural gas from ExxonMobil subsidiaries. (Jt. Appx., Ex. 49 at ¶ 2.) DETM also purchased 265,674 MMBtu of natural gas from Duke Energy Hydrocarbons LLC. (*Id.* ¶ 3.) During this same period, DETM sold 2,711,693,949 MMBtu of natural gas to various third party entities, including AEPES, El Paso Merchant Energy, Enron North America Corporation, SET, and DMT. (*Id.* ¶ 4.) DETM sold more gas to these entities than it

purchased from any affiliates. (*Id.* ¶¶ 2-4.) Each of these entities resold all quantities of gas they purchased. (Jt. Appx., Exs. 8-B, 8-E, 8-G, 8-I, 9-C.)

In December 2003, DETM entered into a stipulation and agreement with FERC to resolve outstanding issues in relation to FERC's Final Report on Price Manipulation in Western Markets. *Order Approving Stipulation and Consent Agreement*, 105 F.E.R.C. ¶ 61,307 (Dec. 19, 2003). In this order, FERC stated that it "exercised exclusive federal jurisdiction under 15 U.S.C. § 3301(21)" over DETM based on DETM's "natural gas trades in the wholesale gas market, in the investigation of 'wash trades.'" *Id.* ¶ 62,470.

Defendant DETM has presented evidence that it was affiliated with a pipeline and made sales for resale which were not of its own or its affiliates' production. Plaintiffs do not challenge any of this evidence except whether DETM adequately established it was affiliated with a pipeline. Specifically, Plaintiffs note that the Duke Defendants previously have denied that DEC controlled DETM due to the corporate structure of DETM and ExxonMobil's ability to veto any major activities by DETM.

As this Court set forth in a prior Order, DEC wholly owns Duke Capital Corporation, which in turn wholly owns Pan Energy Corp. (Order (Doc. #1529) at 5.) Pan Energy Corp. wholly owns Duke Energy Services, Inc., which wholly owns Duke Energy Natural Gas Corporation. (*Id.*) Duke Energy Natural Gas Corporation wholly owns DETMI Management, Inc. (*Id.*) DETMI Management, Inc. owns a sixty percent interest in DETM. (*Id.*) Mobil

Natural Gas, Inc. ("MNGI"), an indirect subsidiary of ExxonMobil, owns the other forty percent of DETM. (*Id.*)

DETM is run by a Management Committee consisting of three representatives from the Duke Energy side and two representatives from the ExxonMobil side. (*Id.* at 6.) The Management Committee acts through the delegation of certain responsibilities and authority to the managing member, which in 2001 and 2002 was DETMI Management, Inc. (*Id.*) Although DETMI Management, Inc. was the managing member, and through its majority status on the committee could outvote the MNGI members on certain matters, the limited liability company agreement mandated that "Material Actions" required unanimous approval by the Management Committee. (*Id.*; Am. & Restated Limited Liability Co. Agreement (Doc. #1532) at 24, 26.)

FERC previously has indicated that "control" may be demonstrated by such veto power. In *Iroquois Gas Transmission System, L.P.*, Iroquois Gas Transmission System, L.P. ("Iroquois") was owned by ten partners, none of which managed or operated the pipeline. 78 F.E.R.C. ¶ 61,108, ¶ 61,379 (Feb. 4, 1997). Instead, an independent management company controlled the pipeline's day-to-day operations. *Id.* at ¶ 61,377, 61,379. The ten partner owners were organized into three voting blocks. *Id.* at ¶ 61,378. One of the partners, TransCanada Iroquois Ltd. ("TCIL"), owned a 29% interest in Iroquois, and owned 83% of the voting rights in one of the voting blocks. *Id.* The voting agreement for this voting block required a 75% majority for some

decisions. *Id.* Additionally, under the overall partnership agreement, some decisions required 75% of the overall partnership vote. *Id.* FERC concluded that under these circumstances, TCIL "can direct partnership policies by casting a negative vote on proposals that require a 75 percent majority," and therefore TCIL had control authority under the pertinent regulation. *Id.*

Here, DETM's limited liability company agreement provides that material actions require unanimous approval of the management committee. The management committee includes DETMI Management, Inc. an indirect wholly owned subsidiary of DEC. Consequently, DEC had the authority to control DETM through a negative vote on any material actions. As discussed elsewhere, and as is evident in *Iroquois Gas Transmission System, L.P.*, it is irrelevant whether DEC actually exercised control over DETM's day-to-day operations. DEC had the authority to exercise control as set forth in the applicable regulation. DETM thus has established it was affiliated with Texas Eastern Transmission, Algonquin Gas Transmission, and East Tennessee Natural Gas because all of these entities were subject to DEC's common control.

Moreover, FERC's actual exercise of jurisdiction over DETM during the relevant time period for the same conduct at issue in this case is evidence that DETM was a jurisdictional seller. Plaintiffs have not presented any evidence that DETM was not a jurisdictional seller during the relevant time frame. No genuine issue of material fact remains that DETM was a jurisdictional seller during the relevant time period.

10. ONEOK Defendants

ONEOK Energy Services Company, L.P. ("OESC"), was a wholly owned subsidiary of ONEOK, Inc., and was a natural gas marketer that bought and sold natural gas. (Jt. Appx., Ex. 12-A at ¶¶ 3, 7.) During the relevant period, Oklahoma Natural Gas Company, Kansas Gas Service Company, and Texas Gas Service Company were local distribution companies and were public utility operating divisions of ONEOK, Inc. (*Id.* ¶ 7.)

OESC obtained the natural gas it sold from either unaffiliated third parties or from ONEOK Resources Company, which was wholly owned by ONEOK, Inc. (*Id.* ¶¶ 3-5, Ex. 12-B at ¶ 2.) ONEOK Resources Company produced approximately 80,000,000 MMBtu of gas during the relevant period. (Jt. Appx., Ex. 12-B at ¶ 3.) During this same period, OESC sold over 249,000,000 MMBtu of gas to Enron Northern America Corp., DMT, AEPES, El Paso Marketing, L.P., and SET. (Jt. Appx., Ex. 12-A at ¶ 6, Ex. 12-B at ¶ 3.) DMT, Enron North America Corporation, El Paso Merchant Energy, L.P., and AEPES resold all of the gas they purchased during the relevant period. (Jt. Appx., Exs. 8-B, 8-G, 8-I, 9-C.)

OESC has established that it was affiliated with local distribution companies, as it was under common control with ONEOK, Inc. and ONEOK, Inc. had divisions operating local distribution companies. OESC also has established that it sold more gas to entities which resold the gas than it could have obtained from its producer-affiliate. Consequently, OESC has established that it was a jurisdictional seller. Plaintiffs have presented no evidence that OESC was not a jurisdictional seller. No genuine

issue of material fact remains that DETM was a jurisdictional seller during the relevant time period.

C. Practice Affecting a Jurisdictional Rate

Plaintiffs argue the word "practice" must be evaluated in light of the surrounding terms to mean traditional activities that the company habitually engages in to determine rates for transactions within FERC's jurisdiction. Plaintiffs argue the alleged false price reporting and wash trades are not traditional, habitual acts undertaken by natural gas companies. Rather, they are unlawful, anti-competitive acts with no legitimate business purpose. Plaintiffs contend that because FERC does not regulate antitrust activity and has no authority to provide a remedy to victims of anti-competitive conduct, Defendants' activities are not "practices" within § 717d's meaning.

Plaintiffs also argue Defendants fail to establish no issue of fact remains that Defendants' conduct affected a jurisdictional rate because Defendants cannot rely on Plaintiffs' pleadings unless Defendants agree to be bound to those facts throughout the proceedings. Plaintiffs also argue that even if Defendants could rely on Plaintiffs' pleadings, Plaintiffs allege Defendants manipulated private price indices, which themselves are not jurisdictional rates.

Defendants respond that practices need not be limited to the jurisdictional context themselves, so long as they affect a jurisdictional rate. Further, Defendants contend the cases upon which Plaintiffs rely do not limit the term "practices" in the manner Plaintiffs suggest. Defendants contend that Plaintiffs are bound by their pleadings and any

admissions therein, including their allegations that Defendants manipulated the price indices and that such manipulation would affect any rate which referred to the indices for a price term. Defendants assert they may rely on Plaintiffs' admissions without admitting those facts for all purposes in this litigation. Defendants further contend that it does not matter whether Defendants actually manipulated the indices, it matters only that such practices would affect a jurisdictional rate, at which point FERC's exclusive jurisdiction attaches.

The NGA does not define the term "practice." However, in interpreting a related statutory provision which sets forth the reporting requirements for natural gas companies,[15] FERC has defined "practice" to mean a "'consistent and predictable course of conduct of the supplier that affects its financial relationship with the consumer.'" *Transwestern Pipeline Co.*, 26 F.E.R.C. ¶ 63,008, ¶ 65,016 (Jan. 10, 1984) (quoting *In Re Michigan Wisconsin Pipe Line Co.*, 34 F.P.C. 621, 626 (Aug. 30, 1965)); *see also Cal. Indep. Sys. Operator Corp. v. Fed. Energy Regulatory Comm'n*, 372 F.3d 395, 400 (D.C. Cir. 2004) (suggesting a practice is an action

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[15] Title 15 U.S.C. § 717c(c) provides:

> Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time . . . and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"habitually being taken by a utility in connection with a rate found to be unjust or unreasonable").

As the Court set forth in its prior Order, the word "practice" "is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it." *Mo. Pac. R. Co. v. Norwood*, 283 U.S. 249, 257 (1931). In other words, it "must be interpreted to be consistent with the words around it," that is, it must be a practice affecting a rate demanded, observed, charged, or collected by a jurisdictional seller in connection with a jurisdictional sale. *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005). In determining its own jurisdiction, FERC has considered whether the practice at issue was a "principal determinant," or whether it had a "significant and direct effect on jurisdictional rates. *See ISO New England, Inc.*, 122 F.E.R.C. ¶ 61,144, ¶¶ 61762-63 (Feb. 21, 2008) (stating the practice at issue was "one of the principal determinants" of price and had "a significant and direct effect on jurisdictional rates" and therefore FERC had jurisdiction under a similarly-worded statutory provision related to the electricity market);[16] *Cal. Indep. Sys. Operator Corp.*,

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[16] Title 16 U.S.C. § 824e(a) sets forth FERC's authority in relation to electricity in language nearly identical to § 717d:

> Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall

119 F.E.R.C. ¶ 61,076, ¶ 552 (Apr. 20, 2007) (rejecting an argument that because almost any practice "affects" jurisdictional rates FERC's jurisdiction would be "limitless," and noting that the practice at issue was more than "tangentially related to jurisdictional rates"); *see also Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d 1496, 1506 (D.C. Cir. 1990) (stating that contracts which affect the jurisdictional rate "indirectly" do not fall within FERC's jurisdiction under § 717d).

The "rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context." *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 281 (1976) (interpreting 16 U.S.C. § 824(e)(a)). But the term "practices" is "limited to those methods or ways of doing things on the part of the [natural gas company] that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so." *Cal. Indep. Sys. Operator Corp.*, 372 F.3d at 403. For example, practices involving general corporate governance or employment decisions are not practices directly affecting a jurisdictional rate. *Norwood*, 283 U.S. at 257; *Cal. Indep. Sys. Operator Corp.*, 372 F.3d at 400-02. However, a long-distance communications carrier's refusal to compensate a payphone operator when a caller uses a payphone to obtain free access to the carrier's lines constitutes a "practice" under the Communications Act of 1934,

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determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

§ 201(b).[17] *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 47-48 (2007).

In the context of FERC's regulation of the wholesale natural gas market, FERC has recognized the importance that the private price indices play in setting jurisdictional rates:

> Price indices are widely used in bilateral natural gas and electric commodity markets to track spot and forward prices. They are often referenced in contracts as a price term; they are related to futures markets and used when futures contracts go to delivery; basis differentials in indices are used to hedge natural gas transportation costs; indices are used in many gas pipeline tariffs to settle imbalances or determine penalties; and state commissions use indices as benchmarks in reviewing the prudence of gas or electricity purchases. Since index dependencies permeate the energy industry, the indices must be robust and accurate and have the confidence of market participants for such markets to function properly and efficiently.

Policy Statement on Natural Gas & Electric Price Indices, 104 F.E.R.C. ¶ 61,121, ¶ 61,404 (July 24, 2003). In February 2003, FERC directed its staff to

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[17] All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.

47 U.S.C. § 201(b).

conduct a fact-finding investigation into whether any entity manipulated natural gas markets in the western United States since January 1, 2000. *Order Revoking Market-Based Rate Authorities & Terminating Blanket Marketing Certificates*, 103 F.E.R.C. ¶ 61,343, ¶¶ 62,295-96 (June 25, 2003). As part of that investigation, FERC staff requested data from certain natural gas companies, including several of the Defendants in this MDL proceeding, regarding the companies' "past reporting practices." *Order Directing Submission of Information With Respect to Internal Processes for Reporting Trading Data*, 103 F.E.R.C. ¶ 61,089, ¶ 61,285 (Apr. 30, 2003).

Upon review of the submitted information, in April 2003, FERC directed certain companies, including several Defendants in these MDL proceedings, to "show that they have corrected their internal processes for reporting trade data to the trade press or that they no longer sell natural gas at wholesale . . . ." *Id.* FERC's investigation had revealed that the companies "had few, if any, formal procedures in place to ensure the accuracy of data reported to the trade press." *Id.* ¶ 61,286. Among the practices FERC's investigation uncovered were reporting of trade data by the traders themselves with little management oversight, orchestrated manipulation of reported prices, and efforts to evade quality-control processes at the trade indices. *Id.* "[B]ecause many gas and electric jurisdictional transactions are based on the published indices," FERC "needs to be sure that the indices are accurate and not subject to manipulation." *Id.* ¶ 61,286.

FERC's investigation uncovered a "system-wide lack of reporting conventions and internal controls to ensure accuracy of reported data." *Id.*_ ¶ 61,287. As FERC has left rate-setting to the forces of a free and competitive market rather than through direct rate-setting measures, market manipulation subverts FERC's regulatory goals by undermining the "accuracy and integrity" of the market. *Id.* FERC therefore required certain natural gas companies, including some of the Defendants in these MDL proceedings, to make certain showings with respect to their price reporting practices. *Id.*

FERC also sought to address these abuses by "providing some degree of regulatory certainty to industry participants that would encourage them voluntarily to report energy transactions to the providers of price indices." *Policy Statement on Natural Gas & Electric Price Indices*, 104 F.E.R.C. ¶ 61,121, ¶ 61,403 (July 24, 2003). Among the actions FERC took was to develop "minimum standards" for jurisdictional entities providing data to the price indices, including that data providers adopt a code of conduct for employees; separate price reporting from trading within the company; report certain details of transactions, including price, volume, and delivery or receipt location; provide an error resolution process, and retain data for three years. *Id.* ¶ 61,408. Companies following these minimum standards would be entitled to a rebuttable presumption that they made their price reports in good faith, and FERC will not investigate or penalize them for inadvertent price-reporting mistakes. *Id.* at ¶ 61,404. However, FERC cautioned that "instances of intentional submission

of false, incomplete or misleading information to index developers" would be subject to prosecution. *Id.* ¶ 61,409.

FERC thereafter amended the blanket certificates by adopting a code of conduct for jurisdictional sellers. *Amendments to Blanket Sales Certificate*, 105 F.E.R.C. ¶ 61,217 (Nov. 17, 2003). The code of conduct required that any jurisdictional entities reporting transactions to private price index publishers "shall provide complete and accurate information to any such publisher." *Id.* at ¶ 5. FERC indicated its code of conduct was "designed to prohibit market-based rate sellers from taking actions without a legitimate business purpose that are intended to or foreseeably could interfere with the prices that would be set by competitive forces," including wash trades. *Id.* at ¶ 38. FERC also reiterated its position that it would not require price reporting to the private indices, but "the practices set forth in our Policy Statement represent the necessary minimum for those entities that choose to report." *Id.* ¶ 73.

The code of conduct prohibited jurisdictional entities from "engaging in actions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market rules, prices, or conditions," including false price reports, wash trades, and collusion. *Order Denying Rehearing of Blanket Sales Certificates Order*, 107 F.E.R.C. ¶ 61,174, ¶ 61,688 (May 19, 2004). FERC implemented these regulations pursuant to its authority under sections 5,[18] 7, and 16 of the NGA.

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[18] Section 5 of the NGA is § 717d. Natural Gas Act, c. 556, § 52 Stat. 821 (June 21, 1938).

Id. ¶ 61,690. FERC did not find any particular jurisdictional seller engaged in these practices. *Id.* Rather, it found "the prohibited practices are unjust and unreasonable, and . . . their explicit prohibition is necessary to ensure that market-based sales of gas will be adequately protected from manipulation and, therefore, will be just and reasonable." *Id.* Moreover, FERC rejected a suggestion that "actions that do not adversely affect prices to a degree that makes them unjust and unreasonable are not covered by the rule" because such a suggestion "fundamentally misunderstands that market-based rates can be presumed just and reasonable only if a marketplace is competitive. Any action or transaction in violation of these regulations puts into question the competitiveness of the market in which the violation occurs." *Id.* ¶ 61,696.

In sum, FERC initiated a proceeding pursuant to its authority under the NGA to determine whether practices related to false price reporting to indices, wash trades, and collusion were just and reasonable practices. FERC determined those practices were unjust and unreasonable, and set the new practices in the Policy Statement setting forth minimum standard reporting practices, and in the code of conduct prohibiting manipulative conduct such as false price reporting, wash trades, and collusion.

Claims aimed at Defendants' alleged practices of false price reporting, wash trades, and anti-competitive collusive behavior therefore are preempted, regardless of whether Defendants actually engaged in such conduct. No genuine issue of material fact remains that such practices directly affect the jurisdictional rate because, as FERC

concluded, any such manipulative conduct would undermine confidence in, and the operation of, a competitive and transparent market for jurisdictional sales where jurisdictional rates are set by reference to the indices.[19]

That FERC has such jurisdiction is demonstrated not only by FERC's actual exercise thereof in relation to these practices, but by the fact that the Court would have little trouble rejecting a challenge to FERC's jurisdiction to prohibit jurisdictional sellers from engaging in false price reporting, wash trades, and other collusive or manipulative conduct that affected the price mechanism by which jurisdictional rates are set. Unlike corporate governance or employment decisions, manipulation of the indices is not insignificant or tangential to jurisdictional rates.

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[19] Plaintiffs do not seriously dispute that jurisdictional rates are set by reference to the indices, except to argue that the scope of FERC's jurisdiction is a legal conclusion rather than a question of fact. FERC has found, after a fact-finding investigation, that jurisdictional rates were set at index during the relevant time period. *Order Directing Submission of Information With Respect to Internal Processes for Reporting Trading Data*, 103 F.E.R.C. ¶ 61,089, ¶ 61,286 (Apr. 30, 2003). Defendants have provided evidence that jurisdictional contracts included price terms set at index. (Defs.' Joint Appx. in Support of Renewed Mot. & Mot. for Summ. J. Based on Fed. Preemption (Doc. #1882), Exs. 37, 38, 44, 49, 50.); *see also Gallo*, 503 F.3d at 1031-32 ("Thus, despite their wide use as reference points in pricing natural gas sales and derivatives, including most of the transactions subject to FERC's jurisdictional authority, the information used to calculate the indices was reported in a less than meticulous manner."). Plaintiffs present no evidence raising an issue of fact that jurisdictional rates were not set at index. Plaintiffs have presented no substantive legal argument as to why Defendants' evidence does not reasonably support only one legal conclusion: that jurisdictional rates were set at index.

Although the indices are not themselves jurisdictional rates, they are the method by which jurisdictional rates are set and embody jurisdictional rates.[20] Thus, manipulation of the indices directly affects jurisdictional rates. *See Am. Gas Ass'n*, 912 F.2d 1506 (agreeing with FERC's interpretation of "contract affecting such rate" to mean "providing for the rate in whole or in part, or specifying or embodying it, or setting forth rules by which it is to be calculated").

Even if a factual determination was required regarding whether Defendants actually engaged in such practices, and such activity actually impacted a jurisdictional rate, Defendants would be entitled to summary judgment. The Court is confronted with the rather odd situation in which Defendants seek to use Plaintiffs' allegations in the various Complaints regarding Defendants' conduct to prove no genuine issue of material fact exists while at the same time positing that issues of fact remain on that very issue because Defendants deny they engaged in such conduct. Plaintiffs, meanwhile, contend Defendants cannot use Plaintiffs' allegations as admissions to support Defendants' summary judgment motion, even though those allegations are necessary for Plaintiffs to prevail on the merits. Plaintiffs contend Defendants cannot conditionally concede Plaintiffs' allegations are true only for purposes of the

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[20] Plaintiff's expert averred that "it can be said that the prices that were the subject of the manipulation are the prices of natural gas in this country." (Defs.' Jt. Appx. in Support of Renewed Mot. & Mot. for Summ. J. Based on Fed. Preemption (Doc. #1882), Ex. 35 at ¶ 18 (emphasis in original).)

summary judgment motions; rather they must be bound by any such concession for all purposes.

Plaintiffs rely on *Lloyd v. Franklin Life Insurance Co.* for the proposition that a party may not make a conditional concession of fact at the summary judgment stage. 245 F.2d 896, 897 (9th Cir. 1957). *Lloyd* stated the following:

> We hold such a condition invalid. A concession of fact on motion for summary judgment establishes the fact for all time between the parties. The party cannot gamble on such a conditional admission and take advantage thereof when judgment has gone against him. This Court will not emasculate thus the efficient devices of summary judgment. Nor will we follow the weary road of common law pleading through tortuous sinuosities whereby facts admitted by a demurrer to any pleading must be established by proof in order to have judgment. This is not to say that there could be no relief by the court from an erroneous admission of a party. But there cannot be a tentative or conditional admission on motion for summary judgment, which by definition posits that there are not in truth any unresolved issues of material fact which must be tried if the wheel turns wrong. Of this all practitioners should take notice. The facts should be established first, and the law can only be laid down in light thereof.

Id. This statement was dicta, however, as the *Lloyd* Court's decision did not turn on the concession. *Id.* at 897-900. Other decisions in the Ninth Circuit indicate that a party generally is bound by its

statements in its own pleadings. *See Cortez-Pineda v. Holder*, 610 F.3d 1118, 1123 (9th Cir. 2010); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995) ("[A] statement in a complaint may serve as a judicial admission."); *Am. Title Ins. Co. v. Lacelaw Corp.* 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.").

To the extent *Lloyd* accurately states the law, application of *Lloyd* in this instance would lead to an absurd result. If Plaintiffs subsequently prevail in showing that Defendants engaged in manipulative conduct that affected the price indices as Plaintiffs allege, Plaintiffs' victory on their state law claims would be short-lived. Upon such a showing, the case for preemption would be complete. Plaintiffs would successfully show Defendants engaged in manipulative practices that affected the indices, and thereby affected jurisdictional rates set by reference to the very same indices.[21] To allow the state law claims to proceed under these circumstances would be a waste of the parties' and the federal judicial system's limited resources.

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[21] Plaintiffs' expert has averred that "if a Defendant has manipulated price indices, everyone who purchases gas based on that price index will be harmed. . . . Indeed, all purchasers who bought at that price index will be harmed because they have purchased at a price that does not reflect the competitive dynamics of the market. Rather, they pay a price that reflects the actions of entities whose goal is to prevent full and free competition and who seek to control the prices paid for natural gas." (Defs.' Joint Appx. in Support of Renewed Mot. & Mot. for Summ. J. Based on Fed. Preemption (Doc. #1882), Ex. 35 at ¶ 49.)

Plaintiffs' theory of the case is that Defendants collusively manipulated the price indices. Plaintiffs cannot prevail without making that showing. However, upon making that showing, Plaintiffs will have established their state law claims are preempted. Plaintiffs' state law claims therefore are doomed, either because Plaintiffs will be unable to prevail on the merits, or, if they do, they will succeed in proving their claims are preempted. To allow such claims to proceed serves no purpose. Consequently, to the extent a factual showing that Defendants actually engaged in such conduct is necessary, the Court concludes Defendants may conditionally admit that they engaged in the alleged misconduct to demonstrate that, taking Plaintiffs' allegations as true, Defendants are entitled to judgment as a matter of law.

D. Kansas Gas Marketing Company

Defendant Kansas Gas Marketing Company ("KGMC") attaches to Defendants' Joint Appendix in Support of Renewed Motion and Motion for Summary Judgment Based on Federal Preemption an affidavit to the effect that it did not submit any data about natural gas prices to the indices, and that it did not engage in wash trades or churning as alleged in the Amended Complaints in *Heartland* and *Learjet*. (Jt. Appx., Ex. 48.) To the extent KGMC is seeking summary judgment on the merits, the Court will deny it. KGMC is not mentioned in the motion for summary judgment, and no argument is made in that motion that KGMC is entitled to summary judgment on the merits. KGMC makes no argument the claims against it are preempted and provides no evidence in support of such a proposition,

which was the basis of the joint motion for summary judgment.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Joint Renewed Motion and Motion for Summary Judgment (Doc. #1880) is hereby GRANTED in part and DENIED in part as follows:

- In *Learjet, et al. v. ONEOK, Inc., et al.*, 2:06-CV-00233-PMP-PAL, all of Plaintiff's claims in the Second Amended Complaint (Doc. #1857) are hereby dismissed as preempted against the following Defendants:
  - ONEOK, Inc.
  - ONEOK Energy Marketing & Trading Co., L.P.
  - The Williams Companies, Inc.
  - Williams Merchant Services Company, Inc.
  - Williams Energy Marketing & Trading
  - American Electric Power Company
  - AEP Energy Services, Inc.
  - Duke Energy Corporation
  - Duke Energy Trading and Marketing Company, L.L.C.
  - Dynegy Marketing & Trade
  - El Paso Corporation
  - El Paso Merchant Energy, L.P.
  - CMS Energy Corporation
  - CMS Marketing Services & Trading Company
  - CMS Field Services

- Reliant Energy, Inc.
- Reliant Energy Services, Inc.
- Coral Energy Resources, L.P.
- Xcel Energy, Inc.
- ePrime, Inc.

• In *Heartland Regional Medical Center, et al. v. ONEOK, Inc., et al.*, 2:07-CV-00987-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #1863) are hereby dismissed as preempted against the following Defendants:

- ONEOK, Inc.
- ONEOK Energy Marketing & Trading Co., L.P.
- The Williams Companies, Inc.
- Williams Merchant Services Company, Inc.
- Williams Energy Marketing & Trading
- American Electric Power Company
- AEP Energy Services, Inc.
- Duke Energy Corporation
- Duke Energy Trading and Marketing Company, L.L.C.
- Dynegy Marketing & Trade
- El Paso Corporation
- El Paso Merchant Energy, L.P.
- CMS Energy Corporation
- CMS Marketing Services & Trading Company
- CMS Field Services
- Reliant Energy, Inc.

- Reliant Energy Services, Inc.
- Coral Energy Resources, L.P.
- Xcel Energy, Inc.
- ePrime, Inc.

• In *Breckenridge Brewery of Colorado, LLC, et al. v. ONEOK, Inc., et al.*, all of Plaintiff's claims in the Amended Complaint (Doc. #717, Ex. A) are hereby dismissed as preempted against the following Defendants:

- Xcel Energy, Inc.
- ePrime Energy Marketing, Inc.

• In *Reorganized FLI, Inc. v. Williams Companies Inc., et al.*, 2:05-CV-01331-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #11 in 2:05-CV-01331-PMP-PAL) are hereby dismissed as preempted against the following Defendants:

- ONEOK, Inc.
- ONEOK Energy Marketing & Trading Co., L.P.
- The Williams Companies, Inc.
- Williams Merchant Services Company, Inc.
- Williams Energy Marketing & Trading
- American Electric Power Company
- AEP Energy Services, Inc.
- Duke Energy Corporation
- Duke Energy Trading and Marketing Company, L.L.C.
- Dynegy Marketing & Trade
- El Paso Corporation

- El Paso Merchant Energy, L.P.
- CMS Energy Corporation
- CMS Marketing Services & Trading Company
- CMS Field Services
- Reliant Energy, Inc.
- Reliant Energy Services, Inc.
- Coral Energy Resources, L.P.
- Xcel Energy, Inc.
- ePrime, Inc.

• In *Arandell Corp., et al. v. Xcel Energy, Inc., et al.*, 2:07-CV-01019-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #11 in 2:05-CV-01331-PMP-PAL) are hereby dismissed as preempted against the following Defendants:

- Xcel Energy, Inc.
- Northern States Power Company
- American Electric Power Company
- CMS Field Services
- CMS Energy Corporation
- CMS Marketing Services & Trading Company
- Coral Energy Resources, L.P.
- Duke Energy Carolinas, LLC
- Duke Energy Trading and Marketing Company, L.L.C.
- Dynegy Illinois Inc.
- DMT G.P. L.L.C.
- Dynegy GP Inc.

- Dynegy Marketing and Trade
- ePrime, Inc.
- El Paso Corporation
- El Paso Merchant Energy, L.P.
- ONEOK, Inc.
- ONEOK Energy Marketing & Trading Co., L.P.
- Reliant Energy, Inc.
- Reliant Energy Services, Inc.
- The Williams Companies, Inc.
- Williams Power Company, Inc. (Williams Energy Marketing & Trading)
- Williams Merchant Services Company, Inc.

• *In Arandell Corp., et al. v. CMS Energy Corp., et al.*, 2:09-CV-01103-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #10-2 in 2:09-CV-01103-PMP-PAL) are hereby dismissed as preempted against the following Defendants:

- CMS Energy Corporation
- CMS Marketing Services & Trading Company
- CMS Field Services

• In *NewPage Wisconsin System, Inc. v. CMS Energy Resource Management Co., et al.*, 2:09-CV-00915-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #1952) are hereby dismissed as preempted against the following Defendants:

- CMS Marketing Services & Trading Company

- CMS Energy Corporation
- CMS Field Services
- Xcel Energy, Inc.
- Northern States Power Company
- Coral Energy Resources, L.P.
- Duke Energy Trading and Marketing Company, L.L.C.
- Dynegy Illinois Inc.
- DMT G.P. L.L.C.
- Dynegy GP Inc.
- Dynegy Marketing and Trade
- ePrime, Inc.
- El Paso Corporation
- El Paso Marketing, L.P.
- ONEOK, Inc.
- ONEOK Energy Marketing & Trading Co., L.P.
- Reliant Energy Services, Inc.
- The Williams Companies, Inc.
- Williams Power Company, Inc. (Williams Energy Marketing & Trading)
- Williams Merchant Services Company, Inc.

• The motion is DENIED as to the remaining Defendant in *Learjet, et al. v. ONEOK, Inc., et al., and Heartland Regional Medical Center, et al. v. ONEOK, Inc., et al.*, 2:07-CV-00987-PMP-PAL, Defendant Kansas Gas Marketing Company.

IT IS FURTHER ORDERED that the ePrime Defendants' Notice of Motion and Motion for Partial

Summary Judgment Based on Preemption (Doc. #1884) is hereby GRANTED as follows:

- In *Sinclair Oil Corporation v. e-Prime, Inc. and Xcel Energy Inc.*, 2:06-CV-00267-PMP-PAL, counts 3 through 11 of Plaintiff's Complaint (Doc. #1 in 2:06-CV-00267-PMP-PAL) are hereby dismissed as preempted against the following Defendants:
  - Xcel Energy, Inc.
  - ePrime, Inc.

IT IS FURTHER ORDERED that Dynegy Inc. and Dynegy Marketing and Trade's Motion for Partial Summary Judgment (Doc. #1891) is hereby GRANTED as follows:

- In *Multiut Corporation v. Dynegy, Inc., et al.*, 2:05-CV-01300-PMP-PAL, counts 2 and 3 of Plaintiff's Complaint (Doc. #1 in 2:05-CV-01300-PMP-PAL) are hereby dismissed as preempted against the following Defendants:
  - Dynegy, Inc.
  - Dynegy Marketing and Trade

IT IS FURTHER ORDERED that ONEOK Energy Services Company's Motion for Partial Summary Judgment (Doc. #1944) is hereby GRANTED as follows:

- In *Sinclair Oil Corporation v. OneOK Energy Services Company, L.P.*, 2:06-CV-00282-PMP-PAL, counts 1-6, 8, and 10 of Plaintiff's claims in the Complaint (Doc. #1 in 2:06-CV-00282-PMP-PAL) are hereby dismissed as preempted against the following Defendants:
  - ONEOK Energy Services Company, L.P.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Class Certification (Doc. #1383) and Plaintiffs' Motion for Class Certification (Doc. #1394) are hereby DENIED as moot.

IT IS FURTHER ORDERED that to the extent this Order results in judgment against fewer than all Defendants and/or judgment on fewer than all claims in any of the above actions, the Court directs final judgment be entered on the above-identified claims for the above-identified Defendants, as no just reason for delay exists.

IT IS FURTHER ORDERED that the stay imposed by the Order Re: Stay of Certain Proceedings (Doc. #1942) is hereby lifted.

IT IS FURTHER ORDERED that the parties shall file any supplemental briefs regarding the various remaining pending motions for class certification on or before August 18, 2011.

DATED: July 18, 2011

/s/
PHILIP M. PRO
United States District Judge

APPENDIX C

UNITED STATES DISTRICT
DISTRICT OF NEVADA

2:03-CV-1431-PMP-PAL
BASE FILE

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

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LEARJET, ET AL.

Plaintiffs,

V.

ONEOK, INC., ET AL.,
2:06-CV-00233-PMP-PAL

Defendants,

J.P. MORGAN TRUST COMPANY, N.A.,

Plaintiff,

V.

WILLIAMS COMPANIES, INC. ET AL.,
2:05-CV-01331-PMP-PAL

Defendants.

ORDER RE: DOC. #1248

Presently before the Court is Defendants' Motion for Reconsideration of May 14, 2008 Order or, in the Alternative, Certification for Interlocutory Appeal (Doc. #1248), filed on July 18, 2008. Plaintiffs filed an Opposition (Doc. #1355) on September 19, 2008. Defendants filed a Reply (Doc. #1382) on October 17, 2008.

I. BACKGROUND

This case is one of many in consolidated Multi District Litigation arising out of the energy crisis of 2000-2001. During that time, the national energy and natural gas markets became mutually dysfunctional, and, feeding off each other spiraled into a nationwide energy crisis. *Amendments to Blanket Sales Certificates*, 105 F.E.R.C. ¶ 61,217, at ¶ 12 (2003). The Federal Energy Regulatory Commission ("FERC") undertook a fact finding investigation of the market crisis in which it concluded, "spot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market." *Id.* FERC found the dysfunctions in the natural gas market stemmed from efforts to manipulate price indices compiled by private trade publications, including reporting of false data and wash trading.[1] *Id.*

Plaintiffs seek to recover damages on behalf of natural gas rate payers, alleging Defendants engaged in anti-competitive activities with the intent

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[1] A "wash trade" is a prearranged offsetting trade of the same product between the same parties, which involves no net change in ownership and no economic risk. Such trades create a false price for use in indices. *Amendments to Blanket Sales Certificate*, 105 F.E.R.C. ¶ 61,217, ¶ 38, ¶ 53.

to manipulate and artificially increase the price of natural gas for consumers. Specifically, Plaintiffs allege Defendants knowingly delivered false reports concerning trade information and engaged in wash trades, which conduct violated Kansas Statutes Annotated § 50-101, et seq. ("Kansas antitrust statutes").

Defendants previously moved to dismiss Plaintiffs' Complaints, arguing the Natural Gas Act ("NGA") preempted Plaintiffs' claims under the doctrines of field and conflict preemption. In separate Orders, the Court suggested FERC's exclusive jurisdiction over the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales, may preempt Plaintiffs' state law antitrust claims. (Order (Doc. #448) at 6-16; Order (Doc. #547) at 6-11.) In *J.P. Morgan*, the Court dismissed Plaintiffs' claims as preempted understanding that Plaintiffs conceded Defendants participated in the interstate natural gas market and FERC therefore had exclusive jurisdiction over Defendants' alleged misconduct in the wholesale natural gas market. (Order (Doc. #448) at 15-16.) The Court later reconsidered this ruling based on Plaintiffs' clarification that in fact they did not concede the factual question of Defendants' participation in the interstate market during the relevant time period. (Order (Doc. #548) at 4-9.) In *Learjet*, the Court ruled that FERC's exclusive jurisdiction may preempt Plaintiffs' claims but it was not clear from the face of the Amended Complaint that Defendants engaged in jurisdictional sales during the relevant

time period, and, on a motion to dismiss, the Court had to construe the Amended Complaint in Plaintiffs' favor. (Order (Doc. #547) at 12-25.)

Defendants thereafter moved for summary judgment, contending Plaintiffs' claims against them are federally preempted under the doctrines of field and conflict preemption. Defendants relied on the Court's previous Orders indicating federal preemption would bar Plaintiffs' claims if Defendants were jurisdictional sellers, i.e., natural gas companies engaged in sales for resale within FERC's jurisdiction. Defendants proffered evidence they engaged in jurisdictional sales during the relevant time period identified in the Complaints. Defendants therefore argued they were entitled to summary judgment because they were natural gas companies subject to FERC's exclusive jurisdiction during the relevant time period, and consequently, Plaintiffs' claims are preempted. Plaintiffs responded that based on decisions from the United States Court of Appeals for the Ninth Circuit following the Court's prior Order, the Court was required to take a transactional view to determine whether Plaintiffs' claims involved conduct falling within FERC's jurisdiction.

In ruling on Defendants' motion for summary judgment, this Court held that "[i]f either the injury-causing transaction or the alleged market manipulation occurred within FERC's jurisdiction, Plaintiffs' claims would be preempted." (Order (Doc. #1025) at 14.) However, where FERC does not have jurisdiction over either the injury-causing sale or the manipulative conduct, FERC lacks jurisdiction and therefore cannot preempt state law. (*Id.*) The Court

also noted that "[m]any entities engage in both jurisdictional and non-jurisdictional sales. That FERC has jurisdiction over entities engaged in jurisdictional sales does not mean FERC has exclusive jurisdiction over those companies' conduct in non-jurisdictional transactions." (*Id.* at 16.)

Finally, the Court held that viewing the facts in the light most favorable to Plaintiffs, "it is possible that Plaintiffs may be able to prove Defendants conspired to control natural gas rates and engaged in manipulative conduct in non-jurisdictional transactions, including wash trades and false reporting of retail and first sale rates to price reporting indices" and that Plaintiffs purchased natural gas at the artificial rates in non-jurisdictional transactions. (*Id.* at 17.) "In such circumstances, FERC would have no jurisdiction over either the injury-causing transaction or the transactions in which Defendants engaged in the alleged misconduct." (*Id.*) The Court therefore denied Defendants' motions for summary judgment because "Defendants' status as jurisdictional sellers during the relevant time period does not preclude the possibility that Defendants engaged in manipulative conduct in non-jurisdictional transactions, such as providing false price reports on non-jurisdictional transactions to trade indices, falling outside FERC's exclusive jurisdiction." (*Id.*)

Defendants now move the Court to reconsider its prior Order. Defendants largely do not take issue with the Court's reasoning outlined above. Rather, Defendants take issue with the Court's conclusion that Defendants' alleged false price reporting to the indices could constitute non-jurisdictional conduct.

Specifically, Defendants argue that under the NGA, FERC has jurisdiction over any practice by jurisdictional sellers which affects a jurisdictional rate. Defendants argue that because any alleged false price reports were reported to a common index, all false price reporting affected the jurisdictional rate, regardless of whether the false report itself was linked to jurisdictional or non-jurisdictional activity, and thus all false price reporting activity falls within FERC's exclusive jurisdiction. Alternatively, Defendants request the Court to certify the question for interlocutory appeal.

Plaintiffs respond that Defendants' argument is foreclosed by the Ninth Circuit's decision in *E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027 (9th Cir. 2007), which Plaintiffs contend already rejected Defendants' preemption arguments. Plaintiffs also assert that Defendants' argument would extend FERC jurisdiction in such a manner as to defeat the dual regulatory scheme envisioned by Congress by expanding FERC jurisdiction over any practice, even non-jurisdictional conduct, which would affect a jurisdictional rate. Finally, Plaintiffs contend the Court should not certify the matter for interlocutory appeal because the Ninth Circuit already has addressed preemption in the Gallo decision.

II. LEGAL STANDARD

Reconsideration of a prior ruling is appropriate only in limited circumstances, such as the discovery of new evidence, an intervening change in controlling law, or where the initial decision was clearly erroneous or manifestly unjust. *Nunes v. Ashcroft*, 375 F.3d 805, 807-08 (9th Cir. 2004). A motion for

reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court already has ruled. *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000).

III. DECISION

As an initial matter, Plaintiffs' argument that the Ninth Circuit previously addressed Defendants' preemption argument in *Gallo* is incorrect. *Gallo* addressed only the preemptive force of the filed rate doctrine. *Gallo*, 503 F.3d at 1034-35. *Gallo* did not address whether FERC's exclusive jurisdiction over natural gas companies and their practices which affect jurisdictional rates preempts state jurisdiction over the same subject matter.

As the Court stated in its prior Order, in the context of natural gas, Congress intended to create an effective and comprehensive dual regulatory scheme that recognized the states' authority to regulate certain natural gas transactions as well as the federal government's authority over interstate commerce. *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 520-21 (1947). Through the NGA, Congress granted to FERC jurisdiction over matters relating to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales. 15 U.S.C. § 717(b); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988). Where Congress has granted FERC jurisdiction, "that jurisdiction is exclusive." *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1076 (S.D. Cal. 2003); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988)

(Scalia, J. concurring) (stating "it is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject"); *Public Util. Comm'n of Cal. v. F.E.R.C.*, 900 F.2d 269, 274 (D.C. Cir. 1990) (explaining that "if there be [FERC] jurisdiction over some component of the transaction, it is exclusive over that component"). Accordingly, "[t]he 'bright line' division of authority adopted by Congress precludes any attempt to inject state law into areas reserved to FERC." *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d at 1076. Thus, to the extent a plaintiff attempts to bring an antitrust claim under Kansas state law that falls within FERC's exclusive jurisdiction, such a claim is preempted. (Order (Doc. #547) at 14-21.)

Although where FERC's jurisdiction exists it is exclusive, FERC must be acting within its statutorily prescribed sphere of control to preempt state law. FERC, as a federal agency, "'literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'" *New York v. F.E.R.C.*, 535 U.S. 1, 18 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986)). Congress carved out from FERC's jurisdiction and left the states to regulate "any other transportation or sale of natural gas or . . . the local distribution of natural gas or . . . the facilities used for such distribution or . . . the production or gathering of natural gas." 15 U.S.C. § 717(b). Additionally, Congress removed "first sales"[2] from FERC's rate-

[2] "[F]irst sales are, in essence, merely sales of natural gas that are not preceded by a sale to an interstate pipeline,

setting jurisdiction. Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989); *Gallo*, 503 F.3d at 1037.

Because of this dual regulatory scheme, the NGA does not preempt a plaintiff's claim where both the injury-causing transaction and the alleged market manipulation occurred outside FERC's jurisdiction. Congress specifically has removed certain subjects from FERC's jurisdiction, and thus it is clear Congress did not intend FERC to occupy the field of market manipulation in non-jurisdictional transactions. As the Court previously stated, "[m]any entities engage in both jurisdictional and non-jurisdictional sales. That FERC has jurisdiction over entities engaged in jurisdictional sales does not mean FERC has exclusive jurisdiction over those companies' conduct in non-jurisdictional transactions." (Order (Doc. #1025) at 16.)

However, Defendants now contend that it is not merely their status as FERC-regulated entities, but additionally FERC's authority under 15 U.S.C. § 717d to regulate any practice by a jurisdictional seller that affects a jurisdictional rate, that confers exclusive FERC jurisdiction, and hence preempts Plaintiffs' claims. Title 15 U.S.C. § 717d provides:

> Whenever the Commission . . . shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-

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intrastate pipeline, local distribution company, or retail customer. In other words, sales by pipelines, local distribution companies, and their affiliates cannot be first sales unless these entities are selling gas of their own production." *Gallo*, 503 F.3d at 1037 (citing 15 U.S.C. § 3301(21)(B)).

> gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . .

A "natural-gas company" means "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a. Consequently, pursuant to § 717d, FERC has jurisdiction to regulate any practice by a jurisdictional seller affecting a rate charged or collected by a jurisdictional seller in connection with the transportation or sale of natural gas within FERC's jurisdiction. Given the preemptive force of FERC's jurisdiction where it exists, to the extent FERC has jurisdiction over a jurisdictional seller's practices that affect jurisdictional rates, that jurisdiction is exclusive and preempts state law on the subject.

Plaintiffs protest that Defendants' construction of the statute would leave nothing for the states to regulate and would eviscerate the dual regulatory scheme Congress envisioned because at some level any practice by a natural gas company affects the jurisdictional rate, including non-jurisdictional conduct. States thus effectively would be ousted from regulating any conduct by a jurisdictional

seller, including matters specifically withdrawn from FERC's jurisdiction.

Although Plaintiffs' concern is not without force, courts and FERC have placed a limiting construction on similar statutory language. The word "practice" "is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it." *Mo. Pac. R. Co. v. Norwood*, 283 U.S. 249, 257 (1931). In other words, it "must be interpreted to be consistent with the words around it," that is, it must be a practice affecting a rate demanded, observed, charged, or collected by a jurisdictional seller in connection with a jurisdictional sale. *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005). In determining its own jurisdiction, FERC has considered whether the practice at issue was a "principal determinant," or whether it had a "significant and direct" effect on jurisdictional rates. *See ISO New England, Inc.*, 122 F.E.R.C. ¶ 61,144, ¶¶ 10-11 (Feb. 21, 2008) (stating the practice at issue was "one of the principal determinants" of price and had "a significant and direct effect on jurisdictional rates" and therefore FERC had jurisdiction under a similarly-worded statutory provision related to the electricity market);[3] *Cal. Indep. Sys. Operator Corp.*,

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[3] Title 16 U.S.C. § 824(e)(a) sets forth FERC's authority in relation to electricity in language nearly identical to § 717d:

> Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or

119 F.E.R.C. ¶ 61,076, ¶ 552 (Apr. 20, 2007) (rejecting an argument that because almost any practice "affects" jurisdictional rates FERC's jurisdiction would be "limitless," and noting that the practice at issue was more than "tangentially related to jurisdictional rates"); *see also Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d 1496, 1506 (D.C. Cir. 1990) (stating that contracts which affect the jurisdictional rate "indirectly" do not fall within FERC's jurisdiction under § 717d). The "rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context." *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 281 (1976) (interpreting 16 U.S.C. § 824(e)(a)). But the term "practices" is "limited to those methods or ways of doing things on the part of the [natural gas company] that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so." *Cal. Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 403 (D.C. Cir. 2004).

Consequently, if Defendants were jurisdictional sellers and their alleged practices of false price reporting and wash trades were practices which directly affected a jurisdictional rate, the practices fall within FERC's exclusive jurisdiction, and Plaintiff's claims therefore will be preempted. The

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contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

Court will grant Defendants' motion for reconsideration.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Motion for Reconsideration of May 14, 2008 Order (Doc. #1248) is hereby GRANTED.

IT IS FURTHER ORDERED that Defendants shall re-file their Motion for Summary Judgment along with any supplementation no later than November 24, 2009.

DATED: November 2, 2009

/s/
PHILIP M. PRO
United States District Judge

OPPOSITION BRIEF

No. 13-271

In The Supreme Court of the United States

In Re Western States Wholesale Natural Gas Antitrust Litigation

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS LEARJET, INC., *et al.*; HEARTLAND REGIONAL MEDICAL CENTER, *et al.*; BRECKENRIDGE BREWERY OF COLORADO, LLC, *et al.*; REORGANIZED FLI, INC.; and SINCLAIR OIL CORPORATION IN OPPOSITION

JENNIFER GILLE BACON*
WILLIAM E. QUIRK
GREGORY M. BENTZ
ANTHONY BONUCHI
ANDREW J. ENNIS
POLSINELLI PC
900 W. 48th Place
Suite 900
Kansas City, Missouri 64112-1895
(816) 753-1000
(816) 753-1536 Fax
jbacon@polsinelli.com

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

ADDITIONAL COUNSEL

DONALD D. BARRY
BARRY LAW OFFICES, LLC
DONALD D. BARRY, CHARTERED
5340 S.W. 17th Street
P.O. Box 4816
Topeka, Kansas 66604
(785) 273-3151

Counsel for Respondents Learjet, Inc. et al., Heartland Regional Medical Center, et al., Breckenridge Brewery of Colorado, LLC, et al., Arandell Corp., et al., Wisconsin System, Inc., et al., and Reorganized FLI, Inc.

ERIC I. UNREIN
FRIEDEN, UNREIN & FORBES, L.L.P.
555 S. Kansas Avenue, Suite 303
Topeka, KS 66603
(785) 354-1100

Counsel for Respondents Learjet, Inc. et al. and Reorganized FLI, Inc.

ISAAC L. DIEL
SHARP MCQUEEN, P.A.
6900 College Blvd., Suite 285
Overland Park, Kansas 66207
(913) 661-9931

Counsel for Respondent Reorganized FLI, Inc.

GARY D. MCCALLISTER
GARY D. MCCALLISTER & ASSOCIATES, LLC
120 N. LaSalle Street, Suite 2800
Chicago, Illinois 60602
(312) 345-0611

Counsel for Respondents Learjet, Inc. et al. and Reorganized FLI, Inc.

THOMAS J. H. BRILL
LAW OFFICES OF THOMAS H. BRILL
8012 State Line Road, Suite 102
Leawood, KS 66208-3712
(913) 677-2004

Counsel for Respondent Reorganized FLI, Inc.

MELVIN GOLDSTEIN, ESQ.
MATTHEW A. CORCORAN, ESQ.
GOLDSTEIN & ASSOCIATES, PC
1757 P Street, NW
Washington, DC 20036
(202) 872-8740

Counsel for Respondent Sinclair Oil Corporation

PHILIP M. BALLIF
DURHAM JONES & PINEGAR
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
(801) 415-3000

Counsel for Respondent Sinclair Oil Corporation

QUESTION PRESENTED

Given that respondents' claims arise out of retail transactions over which the Natural Gas Act, § 1(b), 15 U.S.C. § 717(b), forbids FERC from exercising jurisdiction, and that the conduct respondents challenge had at most an incidental effect on wholesale rates, did the court of appeals correctly hold that the Act – as it existed before it was amended in 2005 – does not preempt respondents' state-law claims that petitioners made false reports so as to artificially inflate prices for retail purchases of natural gas?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statements of the various respondents are grouped below according to the underlying lawsuit to which they belong.

In *Learjet*: Learjet, Inc. is wholly owned by Bombardier Corp. which is in turn wholly owned by Bombardier Inc. Bombardier Inc. is not publicly traded in the U.S., but is publicly traded on the Toronto, Canada stock exchange. Plaintiff Topeka Unified School District 501 is state entity and a public school district in Topeka, Kansas, and is therefore not owned by any publicly-held corporation.

In the *Sinclair* cases: Plaintiff Sinclair Oil Company is a wholly-owned subsidiary of the Sinclair Companies. Neither the Sinclair Oil Company nor the Sinclair Companies are publicly traded and no publicly-held company owns more than 10% of the stock of either Sinclair Oil Company or the Sinclair Companies.

In *Breckenridge*: Breckenridge Brewery of Colorado, LLC is jointly owned by BWD Holdings, LLC and Breckenridge Brewery of Denver. No publicly-traded company owns more than 10% of the stock of Breckenridge Brewery of Denver, BWD Holdings, LLC, or Breckenridge Brewery of Colorado, LLC. Plaintiff BBD Acquisition Co. is owned by BWD Holdings, LLC. Both BBD Acquisition Co. and BWD Holdings, LLC are privately-held corporations, and

RULE 29.6 CORPORATE DISCLOSURE STATEMENT – Continued

no publicly-held corporation owns 10% or more of their stock.

In *Heartland*: Heartland Regional Medical Center is a private non-profit entity, with Heartland Health, also a private non-profit, as its sole member. As such, Heartland Regional Medical Center is not publicly-held by any corporation. Plaintiff Northwest Missouri State University is a state entity and a public university in Maryville, Missouri, and is therefore not owned by any publicly-held corporation. Plaintiff Prime Tanning, Corp. (currently known as Tasman Leather Group LLC) is owned by Tasman Industries, Inc. Tasman Industries, Inc. is a private corporation, and no publicly-traded corporation owns 10% or more of its stock.

In *Reorganized FLI, Inc.*: Reorganized FLI, Inc. is a nongovernmental, private corporate entity. Reorganized FLI, Inc. has no parent corporation and no publicly-held corporation owns 10% or more of the shares of its stock.

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STATEMENT OF THE CASE

A. Factual and Legal Background

The Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.*, enacted by Congress in 1938, has recognized from its inception a dual federal-state regulatory system. *See, e.g., Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 514-15 (1947). Thus, the NGA's core jurisdictional provision, Section 1(b), 15 U.S.C. § 717(b), sets out areas that the Federal Energy Regulatory Commission ("FERC") may, *and may not*, regulate:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, *but shall not apply to any other transportation or sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b) (emphasis added); *see also Panhandle Eastern*, 332 U.S. at 519 (noting "meticulous" Congressional allocation of NGA regulatory authority between states and federal government, and stating

that federal regulatory area "did not include direct consumer sales, whether for industrial or other uses").

By the 1990's, after market changes, users of natural gas were able to buy directly from gas producers, paying only transportation fees to pipelines and utilities. Because these were not "sales for resale," they were outside FERC's jurisdiction under Section 1(b) of the NGA. While buying directly was impractical for most residential consumers, most large industrial and commercial users (like the respondents and proposed class members in these cases) began buying their own gas themselves or through an agent.

To establish a pricing method for this new direct market, parties began to refer to privately-published indexes as reference points. In the 1980's, small private publications like *Inside FERC* and *Gas Daily* had begun collecting reports from gas traders about the volumes and prices of natural gas being sold at various trading points ("hubs") around the country. RE1341. That data was compiled to create and publish price indexes for those hubs on a monthly or daily basis. *Id.* As natural gas marketing began including more direct sales, consumers began using these indexes to set prices for the gas they were buying. *Id.* By the mid-1990's, the vast majority of all retail gas sales referenced an index price for a particular hub or location – for example, the price term in a natural gas sales contract might read "*Inside FERC* Southern Star Central + $0.31 per MMBtu." *See Policy Statement on Natural Gas & Electric*

Price Indices, 104 FERC ¶ 61121, at 2-3 (July 24, 2003), 2003 WL 21725984. While index prices were predominantly used to set the price in wholly non-jurisdictional transactions like the retail sales respondents challenge here, occasionally private parties, often including petitioners, might also choose them as a base point for pricing in jurisdictional transactions like sales for resale.

The method of determining price indexes had what proved to be a major flaw – there was no system to ensure that the reported information accurately described the market. There was no formal reporting process, and no way to independently verify the reports. RE1341. And FERC had no regulatory authority over the private publications or their indexes.

Energy traders, left to police themselves, often changed or simply made up the trades they reported to the publishers. RE1341-66. In fact, some petitioners have acknowledged that their traders fabricated virtually all reports to the publications during the relevant timeframe. *See, e.g.*, RE1351 (finding that 99% of El Paso's reported trades were false or inaccurate). Traders employed by many of the petitioners have been formally investigated, fined, and even imprisoned for their illegal conduct. *See* generally RE904-1325. Indeed, petitioners here, including Dynegy, AEP, Williams, CMS, ONEOK, and El Paso, have admitted their employees falsely reported data and have paid federal agencies millions of dollars to settle charges related to that market manipulation. *See* RE1340.

B. Procedural History

1. Respondents in all cases are industrial and commercial users of natural gas who purchased gas for their own consumption. *See, e.g.*, RE1504. They allege that petitioners conspired to manipulate privately-published index prices by reporting fictitious transactions and "wash" sales to the index publishers, thereby artificially inflating the retail prices paid by respondents to petitioners. None of the retail sales at issue in these cases were or could be regulated by FERC. *See Panhandle Eastern*, 332 U.S. at 507.

The district court held that respondents' state antitrust claims were impliedly preempted by the NGA. Although NGA § 1(b), 15 U.S.C. § 717(b), forbids federal regulation of retail natural gas sales, the district court held that a different NGA section, § 5(a), 15 U.S.C. § 717d, allowed FERC to regulate "practices affecting jurisdictional rates," and therefore preempted respondents' retail claims by implication.

2. The Ninth Circuit, in an opinion by Judge Bea, unanimously reversed. Adopting the D.C. Circuit's approach to harmonizing NGA §§ 1(b) and 5(a), the Ninth Circuit reasoned that Section 5(a) should apply only to activity by jurisdictional sellers "directly governing the rate in a jurisdictional sale" so as to preserve "the jurisdictional provisions of § 1(b), which reserve to the states regulatory authority over non-jurisdictional sales. . . ." Pet. App. 31a-32a. Because respondents here brought "claims arising out

of transactions outside FERC's jurisdiction," Pet. App. 28a, the court of appeals held there was no implied preemption.

REASONS FOR DENYING THE WRIT

The Natural Gas Act creates a scheme of dual federalism. Section 1(b), 15 U.S.C. § 717(b), gives FERC authority over certain wholesale sales but reserves to the States exclusive regulatory power – and thus expressly forbids FERC from exercising jurisdiction – over "any other transportation or sale of natural gas" (that is, retail sales). Another provision of the Act, Section 5(a), 15 U.S.C. § 717d(a), allows FERC to regulate "practice[s]" affecting certain wholesale rates. In order to implement these two statutory provisions in harmony, this Court has held for decades that the Act does *not* preempt state regulation over practices that have merely an incidental or indirect effect on wholesale transactions. The federal courts of appeals – most prominently, the D.C. and Fifth Circuit – have followed suit. To hold otherwise, these courts have recognized, would render meaningless the jurisdiction NGA § 1(b) gives states over retail transactions, because virtually any industry "practice" might incidentally "affect" wholesale rates. The Ninth Circuit's decision resides comfortably in the mainstream of this longstanding precedent.

Petitioners nevertheless seek certiorari, contending that the Ninth Circuit's unremarkable holding conflicts with decisions from two state supreme courts and will disrupt energy regulation. But the alleged conflict is illusory. The state court decisions petitioners cite both addressed preemption of different kinds of transactions than those at issue here – transactions that those courts deemed to be *wholesale* in nature and thus clearly within FERC's jurisdiction, not the retail sales to consumers that are the sole subject of these lawsuits. Furthermore, petitioners' disruption argument (echoed by their *amici*, which consist largely of trade associations of which petitioners are influential members[1]) simply depend on a mischaracterization of the Ninth Circuit's holding. The court of appeals did not hold that state law can impose liability for conduct that "directly affects" wholesale rates, so long as the plaintiffs' claims "nominally relate to a subject matter – retail transactions – over which the NGA exercises no authority."

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[1] For example, members of the American Gas Association include defendants CMS Energy Corporation, Duke Energy Corporation, ONEOK, Inc., and Xcel Energy, Inc., and certain affiliates or subsidiaries of defendant El Paso, Inc. *See* American Gas Association, Member Addresses and Places of Business, http://www.aga.org/membercenter/Pages/MembershipDirectory-links.aspx (last visited October 23, 2013). Similarly, defendants Dynegy, Xcel Energy, and Coral Energy Resources, LP (n/k/a Shell Energy N.A.) are all members of the Western Power Trading Forum. *See* Western Power Trading Forum, Membership and Staff, http://www.wptf.org/?q=node/3 (last visited October 23, 2013).

Pet i, 19. Instead, the court of appeals held that respondents' claims here are not preempted because they challenge misdeeds that did *not* "directly govern" wholesale rates (Pet. App. 31a); the claims actually "ar[o]s[e] out of transactions outside of FERC's jurisdiction." Pet. App. 28a. Not even petitioners assert that such reasoning contravenes this Court's precedent.

At any rate, further review is unwarranted for additional, prudential reasons. In 2005, Congress amended the NGA in an attempt to alter FERC's jurisdiction, such that the question petitioners frame is unlikely to arise again anyway – and any decision this Court rendered here would have no import beyond this precise litigation. And even if this Court were inclined – contrary to all its usual practices – to review a case with no potential impact beyond the parties involved, certiorari would still be inappropriate in light of the case's current interlocutory posture. Contested factual issues have yet to be developed, and petitioners may well raise still more legal arguments to avoid liability. Far better for this Court to save its resources for, at the very most, a single review of this one-off case.

I. The Opinion Below Does Not Conflict With Either of the State Court Decisions Relied on by Petitioners.

The Ninth Circuit's decision follows the well-established path charted for decades by other federal

courts of appeals. And, contrary to petitioners' contentions, the decision does not conflict with holdings from the Tennessee or Nevada Supreme Courts.

1. The Ninth Circuit explained – and petitioners nowhere dispute – that it found "persuasive" and thus followed "the D.C. Circuit's approach to reading the word 'practices' [in § 717d] narrowly as to not expand unduly the scope of FERC's jurisdiction" into areas that the NGA reserves for state regulation. Pet. App. 34a; *see also Conoco, Inc. v. FERC*, 90 F.3d 536, 552 (D.C. Cir. 1996); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1505 (D.C. Cir. 1990). Under the D.C. Circuit's test, a defendant in a case arising, as here, from retail transactions cannot prevail on preemption grounds simply by showing that the plaintiffs are challenging a practice that might have some incidental effect on wholesale rates. *Id.* Finding preemption under these circumstances, the D.C. Circuit has explained, would be "oxymoron[ic]," for it would effectively grant FERC jurisdiction over transactions that the NGA reserves for state regulation. *Am. Gas Ass'n*, 912 F.2d at 1506.

American Gas, in particular, rejected an argument much like petitioners' argument here. Gas companies there argued that FERC had jurisdiction to review certain agreements because those agreements undeniably "affected" to some degree costs that determine rates in jurisdictional transactions. *Id.* The D.C. Circuit rejected that argument, reasoning that such an attenuated effect on wholesale rates could not override Section 1(b)'s clear limits on

FERC's jurisdiction. *Id.*; *see also Cal. Ind. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (giving "practices affecting a . . . jurisdictional rate" language from analogous section 206 of the Federal Power Act, 16 U.S.C. § 824e(a), the same narrow reading it had earlier given "contracts affecting . . . a jurisdictional rate in *American Gas*). The "effect" in the present case and the "effect" in *American Gas* are similarly attenuated, and thus the "effect" here should similarly be "beyond [§ 717d]'s reach." *Am. Gas Ass'n*, 912 F.2d at 1506.

The Ninth Circuit's holding is also consistent with the law in the Fifth Circuit – the other federal court of appeals with considerable expertise and importance in this area. *See Texas Pipeline Ass'n v. FERC*, 661 F.3d 258, 262-63 (5th Cir. 2011) (refusing to read NGA § 23, allowing FERC to regulate "market participants," as extending FERC's jurisdiction beyond the limitations of NGA § 1(b)); *Shell Oil Co. v. FERC*, 566 F.2d 536 (5th Cir. 1978) (rejecting FERC's attempt to extend its jurisdiction to natural gas companies otherwise within its jurisdiction when they engaged in transactions outside FERC's Section 1(b) authority).

2. Petitioners claim that two state courts of last resort – the Supreme Courts of Tennessee and Nevada – have issued opinions that directly conflict with the Ninth Circuit's holding here. Petitioners briefly cited both opinions below but never argued that an adverse decision here would conflict with either one. Nor did petitioners seek en banc review

based on any such alleged split, as litigants usually would when they believe a federal court of appeals' holding has created a conflict on an important issue of law. Perhaps this is because the conflict petitioners now allege is so easily refuted.

The plaintiffs in both state-court cases were not challenging ultimate retail sales like those at issue here, but rather what both courts deemed to be *wholesale* natural gas sales that both courts assumed were within FERC's jurisdiction. Neither case even addressed – much less agreed with – the legal argument petitioners advance here, namely that the NGA impliedly preempts claims arising from *retail* transactions because they concern a "practice" that, under Section 5(a), "affected" wholesale rates.

a. Contrary to petitioners' assertion, *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), did not involve plaintiffs who were truly "retail purchasers," Pet. 13. Instead, because of the particulars of the transactions giving rise to the plaintiffs' claims, the Tennessee Supreme Court deemed the plaintiffs to be "wholesale" purchasers. *Id.* at 872. To the extent that these transactions are properly deemed to be wholesale in nature, they constitute the very kind of "sales for resale" that NGA § 1(b) explicitly allocates to FERC's jurisdiction.

The present case, on the other hand, involves challenges to *retail* sales of natural gas; petitioners, in fact, concede that this case involves "claims asserted by litigants who purchase[d] gas in *retail transactions*."

Pet. i (emphasis added). Thus, petitioners, unlike the defendants in *Leggett*, do not claim that the transactions at issue here should be properly deemed to be "wholesale" in nature under NGA § 1(b). Rather, petitioners contend that even though respondents' claims arise from retail transactions, and thus fall on the state-side of the dichotomy that Section 1(b) creates, the claims are nevertheless preempted because they challenge conduct that petitioners insist falls under Section 5(a) as a "practice" affecting wholesale rates. The Tennessee Supreme Court never addressed any such argument, and nothing in *Leggett* suggests that court would accept it.

b. The Nevada Supreme Court's decision also presents no conflict. In *State ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013), the court, like the court in *Leggett*, was addressing claims directed at wholesale, FERC-jurisdictional sales. The contrast with the present case – where respondents are making claims about non-jurisdictional *retail* sales made to them by petitioners – is stark.

Petitioners, in fact, emphasized this very distinction when they successfully opposed certiorari last Term in *Johnson*. There, the respondents (one of which is a petitioner here) succinctly assured this Court that there was no conflict between *Johnson* and the present case because *Johnson* involved wholesale transactions that the Ninth Circuit's opinion below would recognize as within FERC's jurisdiction:

> Because the instant case [*Johnson*] challenges only wholesale transactions within FERC's jurisdiction, the outcome below would have been no different under the Ninth Circuit's approach [in *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007)].
>
> For similar reasons, the Ninth Circuit's recent decision in *In re: Western States Wholesale Natural Gas Antitrust Litigation*, F.3d, 2013 SL 1449919 (9th Cir. Apr. 10, 2013), does not support review in this case, as it also would not allow Petitioners' antitrust claims challenging wholesale transactions *within FERC jurisdiction*.

Br. in Opp. at 13-14, *Nevada v. Reliant Energy, Inc.*, 133 S.Ct. 2853 (June 3, 2013) (No. 12-980) 2013 WL 2428988 (emphasis original). The present case, as petitioners recognize in their Question Presented, involves challenges to retail transactions that NGA § 1(b) expressly excludes from FERC's jurisdiction. There is no conflict with the state court decisions flagged by petitioners, or indeed with any decision of any court.

II. The Issue That Petitioners Raise Lacks Ongoing Significance.

While petitioners assert that the Ninth Circuit's holding is "tremendously important," Pet. 24, the reality – for two reasons – is that the holding lacks ongoing significance.

1. The law has changed since the conduct at issue here took place. The conduct that gave rise to the present cases occurred over ten years ago, in 2000-2002. At that time neither Congress nor FERC were regulating how natural gas companies used the market indexes to which they reported both jurisdictional and non-jurisdictional transactions. Retail sales based on the indexes remained beyond FERC's reach, by statute, for the reasons the Ninth Circuit has explained. *See* Pet. App. 31a-32a. At the same time, FERC had taken a "hands off" approach to the wholesale market to any extent it related to the indexes. Consequently, the question here is whether the NGA, as it existed and was implemented by FERC during 2000-2002, preempted plaintiffs' state antitrust claims.

The federal regulatory climate that forms the backdrop of this case, however, no longer exists. In 2005, Congress passed the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) ("EPAct"), in which Congress intended, among other things, to empower FERC to curb the very sort of anticompetitive conduct petitioners engaged in here. (As explained more fully below, this statutory amendment underscores the correctness of the Ninth Circuit's decision, because it assumes that FERC previously lacked the authority to regulate this kind of conduct.) What became 15 U.S.C. § 717c-1 states:

> It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or

> the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.

The 2005 EPAct permanently changes the NGA preemption analysis. While the Ninth Circuit considered only a narrow challenge to the interplay between NGA § 1(b) and § 5(a), any future preemption challenge in a case such as this will involve whether the EPAct, and the expansion of FERC's jurisdiction that Congress intended to establish in Section 717c-1,[2] precludes state-law claims challenging retail sales based on unlawfully manipulated private indexes. The Ninth Circuit's opinion – addressing whether, in 2000-2002, NGA § 5(a) by implication extended FERC jurisdiction to retail sales – can have no precedential value in such an inquiry.

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[2] Congress clearly intended in 2005 to grant FERC expanded authority to regulate manipulative practices. *See* 151 Cong. Rec. S7451-04 (2005) (comments of Senator Feinstein noting that FERC was unable to police the market manipulation rampant in 2000-2002 in California without the authority vested by the EPAct in 2005); *see also* 151 Cong. Rec. S8335-01 (2005) (stating that the EPAct gave "*new* protections for consumers from market manipulation.") (emphasis added).

2. Even with respect to the law as it existed before the 2005 amendments, there is no genuine concern that respondents' state-law claims will subject petitioners to liability for conduct for which they otherwise would not be liable. This is because, unlike an ordinary defendant claiming preemption, petitioners do not contend that federal law would absolve them from the misdeeds that respondents allege. To the contrary, there is every reason to believe that federal antitrust law – just like the state law at issue here and every other state's law – would deem petitioners liable for colluding to misreport prices. *See, e.g., Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002).

III. The Opinion Below is Fully Consistent With This Court's Decisions Addressing the Natural Gas Act's Jurisdictional Dichotomy.

The Ninth Circuit's decision, recognizing – like the D.C. and Fifth Circuits before it – the clear division between federal and state jurisdiction set up by the Natural Gas Act, is fully consistent with this Court's precedent. Petitioner simply mischaracterizes the court of appeals' decision in contending otherwise.

1. Congress used the NGA to construct a dual federal-state regulatory scheme, set out in Section 1(b) of the Act, that expressly excludes retail sales of natural gas from FERC's jurisdiction. More than 60 years ago, this Court acknowledged the jurisdictional

confines of the NGA in *Panhandle Eastern,* and held that the NGA was specifically intended to let the states continue regulating in areas they had traditionally occupied, like direct sales of natural gas for consumption, which are the same sales challenged here. 332 U.S. at 519. In expressly rejecting a pipeline's claim that Congress by enacting the NGA had "occupied the field," this Court recognized that the NGA left retail sales of natural gas to state regulation:

> Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach. *That area did not include direct consumer sales,* whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained.

Panhandle Eastern, 332 U.S. at 519 (emphasis added). Thus, the Court concluded, the NGA created a dual regulatory system that preserved the States' traditional authority:

> The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the

> states and in no manner usurping their authority.

Id.

This Court's decisions have consistently adhered to the NGA's dual jurisdictional scheme recognized in *Panhandle Eastern*. In *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), this Court recognized that NGA § 1(b) "specified the areas into which this power [of the Commission] was not to extend." *Id.* at 503. The Court then refused to read other provisions of the Act, *including Section 5*, to expand the Commission's jurisdiction into areas – like the retail sales now at issue – that are excluded from Section 1(b) jurisdiction. *Id.* at 508 ("Nothing in the sections [NGA §§ 4(a), (b), (c), 5(a) and 7(c)] indicate that the power given to the Commission over natural-gas companies by Section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission. . . .").

This Court's 1989 decision in *Northwest Central Pipeline v. State Corp. Commission of Kansas*, 489 U.S. 493 (1989), is particularly instructive. There a pipeline company, like petitioners here, tried to use Section 5 of the Act to expand FERC's jurisdiction for preemption purposes, arguing that the challenged conduct "affected" jurisdictional rates, even though it was directed at natural gas production, a matter (like retail sales) clearly left to the states under NGA § 1(b). *Northwest Central*, 489 at 506-07. This Court

rejected that attempt, recognizing that it would strip the core jurisdictional provision in Section 1(b) of the Act of any real meaning:

> To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations.

Id. at 514.

This Court's analysis applies here with equal force. As the Ninth Circuit recognized, expanding FERC's jurisdiction to any practice that might "affect" a jurisdictional rate, and then holding all regulation of those practices to be preempted, would strip the States of the ability to regulate retail sales, an area expressly left to them by Section 1(b) of the Act. Pet. App. 31a-32a. Everything from state minimum wage laws to purely local environmental regulations could conceivably have an "incremental effect" on wholesale natural gas rates. Yet if the NGA's scheme of dual federalism is to be preserved, only state-law regulation that is actually "directed at" wholesale rates can be covered by Section 5; state-law regulation of practices that have merely "some indirect effect on rates and facilities of natural gas companies is not preempted." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988)

In other words, Section 5's reference to "practices . . . affecting rates" cannot expand the basic jurisdictional grant of Section 1(b), just as it could not expand FERC's jurisdiction to cover exempt "production" in *Northwest Central*. Congress cannot have intended to preempt by implication the entire field of state antitrust regulation of retail sales of natural gas when Section 1(b) of the NGA expressly excludes those same retail sales from FERC regulation.

2. Instead of coming to grips with the line this Court's jurisprudence draws between state regulation of practices "directed at" wholesale rates and those that merely generate "some indirect effect" on them, petitioners assume away this whole line-drawing issue in their question presented. The Petition for Certiorari asks whether the NGA preempts an industry practice that "directly affect[s]" the wholesale natural gas market. Pet. i. Petitioners' *amici* likewise act as if the Ninth Circuit held that state law may directly regulate wholesale rates so long as the plaintiffs in a lawsuit happened to purchase natural gas at retail.

Yet one searches in vain for any words in the Ninth Circuit's opinion stating that petitioners' misreporting directly affected wholesale rates, much less reliance on any statement from respondents "conced[ing]" (Pet. 8) such an effect.[3] To the contrary,

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[3] The district court once used the phrase "directly affect," *see* Pet. App. 110a, but respondents challenged that characterization

(Continued on following page)

the Ninth Circuit decided this appeal on the premise that petitioners' misreporting had at most an *indirect* effect on wholesale rates. Pet. App. 31a. And for good reason: not only are many more retail sales priced by private parties based on indexes, but it was mostly petitioners themselves who happened to use inflated indexes as pricing points in wholesale transactions among themselves. Lest there be any confusion as to the Ninth Circuit's understanding of the law, the court of appeals effectively acknowledged that the case would have been different if respondents' state-law claim had "directly govern[ed]" wholesale rates. *Id.*

Petitioners are thus unable to cite any decisions from this Court that genuinely call into question the Ninth Circuit's analysis. Each case petitioners cite involved challenges to activity in the wholesale market that falls clearly on the FERC side of Section 1(b) regulatory jurisdiction. And each addressed state regulation directed at matters within FERC's unquestioned jurisdiction. *Schneidewind* concerned, in effect, an attempt by Michigan to regulate the reasonableness of rates charged by natural gas wholesalers. As this Court put it, Michigan's attempt to regulate a jurisdictional seller's issuance of securities "amount[ed] to regulation in the field of gas

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on appeal as incorrect. The Ninth Circuit, based on the record as it currently exists, agreed with respondents.

transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304.

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988), is similar. There the State of Mississippi tried to use a state statute to challenge, in effect, the reasonableness of a wholesale electric power allocation already approved by FERC, a matter well within FERC's regulatory authority. *See* 487 U.S. at 371 ("States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair."). In contrast, no such state infringement of federal regulation is implicated here. Petitioners have always been subject to state antitrust enforcement of their direct retail sales. State regulation of anticompetitive conduct at the retail level – the only conduct challenged by these lawsuits – does not overlap in the slightest with federal regulation of natural gas "sales for resale."

Petitioners' reliance on *Kurns v. Railroad Friction Products Corp.*, 132 S.Ct. 1261, 1265 (2012), is similarly misplaced. Unlike this case, the plaintiff's claims in *Kurns* (that he contracted mesothelioma installing asbestos brake pads on locomotives) fell squarely within a federally occupied field. Eighty-six years before *Kurns*, this Court had declared that the federal government had general authority over the entire subject of locomotives: "It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Naiper v. Atlantic Coast Line R. Co.*, 272

U.S. 605, 611 (1926) (holding state laws requiring certain devices be included in locomotives for worker safety were preempted). It simply made no difference whether the *Kurns* plaintiff's claims arose from making repairs to the locomotive, or from the locomotive's operation on the railroad line – the entire field of locomotives was preempted. *Kurns*, 132 S.Ct. at 1268-69.

Here, though, Congress never "manifested the intent to occupy the entire field" of all natural gas transactions. To the contrary, as this Court has repeatedly held, Congress has expressly left regulation of retail sales to the States.

3. Finally, the Ninth Circuit's holding is entirely consistent with FERC's past litigation positions and regulatory issuances. As the Ninth Circuit noted, FERC has previously argued (successfully) to the D.C. Circuit that it is not enough to trigger its exclusive jurisdiction for state regulation to potentially indirectly "influence" wholesale rates; the state law must "directly govern[]" such rates. Pet. App. 31a (quoting FERC's argument in *American Gas Ass'n*, 912 F.2d at 1506).

Furthermore, FERC itself has recognized that it lacked statutory authority in 2000-2002 to regulate the sort of retail transactions that are the subject of the present suit. Although petitioners suggest (Pet. 9) that FERC's 2003 "Code of Conduct" was a regulation of the very practices now at issue, the exact opposite is true. In its Order Denying Rehearing

issued January 29, 2004 in *National Ass'n of Gas Consumers,* 106 FERC ¶ 61,072 at ¶ 11, FERC recognized that "[t]he purpose of the code of conduct is to ensure the integrity of the gas market that remains subject to the Commission's jurisdiction." And it specified in that same order that its jurisdiction, and thus the Code of Conduct, did not extend to retail sales: "[T]he Commission does not have commodity jurisdiction over . . . natural gas sales to end users (direct sales or retail sales)."

Moreover, Congress's attempted expansion of FERC's authority in the 2005 EPAct necessarily shows that FERC lacked this authority over defendants during the period relevant to these cases, approximately 2000 through 2002. *See Cal. Indep. Sys. Operator Corp.,* 372 F.3d at 401 (congressional acts should not be read to be superfluous); *see also supra* at 13 n. 2.

IV. The Interlocutory Posture of this Case Makes It A Particularly Inappropriate Candidate For Review.

The fact that this case remains in the discovery stage, with critical factual and legal developments still yet to occur, *see* Pet. App. 63a, separately makes this case a poor candidate for certiorari.

The interlocutory posture of this case "alone furnishe[s] sufficient ground" for this Court to deny the petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). Where

"the Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). Accordingly, "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown*, 240 U.S. at 258.

That general rule is especially apt here. As noted above, petitioners' whole legal argument proceeds from the premise that the respondents are challenging industry practices that "directly affect[ed] the wholesale gas market." Pet. i. But the factual underpinning of that assertion is missing. And at this stage of proceedings, all genuine issues of material fact must be assumed in respondents' favor. *See* Pet. App. 23a. It thus makes little sense for this Court to step in now, before the facts are fully developed.

In addition, petitioners may raise still more legal arguments aimed at escaping liability, just as they previously tried to argue that their fictitious sales reports and index manipulation were protected by the filed rate doctrine, or were preempted by the Commodity Exchange Act. In situations like this, the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari). This practice avoids piecemeal litigation. And it is particularly sensible when, as here, the litigation at issue is consolidated such that no other lawsuit is likely to

subject petitioners to liability while this case plays out on remand.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JENNIFER GILLE BACON*
WILLIAM E. QUIRK
GREGORY M. BENTZ
ANTHONY BONUCHI
ANDREW J. ENNIS
POLSINELLI PC
900 W. 48th Place
Suite 900
Kansas City, Missouri 64112-1895
(816) 753-1000
(816) 753-1536 Fax
jbacon@polsinelli.com

**Counsel of Record*

October 2013

OPPOSITION BRIEF

No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., ET AL., PETITIONERS,

v.

LEARJET, INC., ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE WISCONSIN RESPONDENTS IN OPPOSITION

ROBERT L. GEGIOS*
STEPHEN D. R. TAYLOR
RYAN M. BILLINGS
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110
rgegios@kmksc.com

Counsel for
The Wisconsin Respondents

**Counsel of Record*

QUESTION PRESENTED

Did the court of appeals correctly follow settled law when it held that under the Natural Gas Act (15 U.S.C. § 717 *et seq.*)—as it existed before significant amendments to the statute by Congress in 2005—claims brought under state antitrust laws challenging exclusively retail sales of natural gas for consumption are not preempted by federal law?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. AEP Energy Services; American Electric Power Company, Inc.; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Merchant & Trading Company; Williams Merchant Services Company, Inc.; Williams Power Company, Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc., petitioners on review, were defendants-appellees below.[1]

2. Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Merrick's, Inc.; Sargento Foods Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; NewPage Wisconsin System, Inc.; Reorganized FLI, Inc.; Sinclair Oil Corporation; Heartland Regional Medical Center; Prime Tanning Corp.; Northwest Missouri State University; and Multiut Corporation, respondents on review, were plaintiffs-appellants below.

3. Duke Energy Corporation; CMS Energy Corporation; and Reliant Energy, Inc., respondents on review, were defendants-appellees below.

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[1] The parties' names reflect their listings in the docket below. Some entities have undergone corporate reorganizations subsequent to the period in question (2000-2002).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Wisconsin Respondents disclose their corporate affiliations as follows:

Arandell Corporation has no parent and no publicly held corporation owns 10% or more of its stock.

ATI Ladish LLC, f/k/a Ladish Company, Inc., is a wholly owned subsidiary of Allegheny Technologies Incorporated. No publicly held corporation owns 10% or more of the stock of Allegheny Technologies Incorporated, which is publicly traded on NASDAQ.

Briggs & Stratton Corporation has no parent and BlackRock, Inc., which is publicly traded on the New York Stock Exchange, is the only publicly held corporation that owns 10% or more of its stock.

Carthage College has no parent and no publicly held corporation owns 10% or more of its stock.

Merrick's, Inc., is a wholly owned subsidiary of Merrick Animal Nutrition, Inc. No publicly held corporation owns 10% or more of the stock of Merrick's, Inc., or Merrick Animal Nutrition, Inc.

NewPage Wisconsin System, Inc., is a wholly owned subsidiary of NewPage Consolidated Papers, Inc. No publicly held corporation owns 10% or more of the stock of NewPage Wisconsin System, Inc., or NewPage Consolidated Papers, Inc.

Sargento Foods Inc. has no parent and no publicly held corporation owns 10% or more of its stock.

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Schwartz, David, *The Natural Gas Industry: Lessons for the Future of the Carbon Dioxide Capture and Storage Industry*, 19 Stan. L. & Pol'y Rev. 550 (2008) 11, 12

OPINIONS BELOW

The unanimous April 10, 2013, opinion of the United States Court of Appeals for the Ninth Circuit, reversing the United States District Court for the District of Nevada's grant of summary judgment, is reported at 715 F.3d 716. Pet. App.[2] 1a. The district court's July 18, 2011, opinion, granting petitioners' motion for summary judgment, is unreported, but available at 2011 WL 2912910. *Id.* at 64a. The district court's November 2, 2009, opinion, granting petitioners' motion for reconsideration of the district court's earlier denial of petitioners' motion for summary judgment, is unreported. *Id.* at 124a.

JURISDICTION

The court of appeals entered judgment on April 10, 2013. On June 20, 2013, Justice Kennedy extended the time to file a petition for certiorari up to and including Saturday, August 24, 2013. The petition was filed August 26, 2013. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1(b) of the Natural Gas Act, codified at 15 U.S.C. § 717(b), provides:

> (b) Transactions to which provisions of chapter applicable
> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of

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[2] "Pet. App." refers to the Petitioners' Appendix accompanying the petition.

> natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 5(a) of the Natural Gas Act, codified at 15 U.S.C. § 717d(a) (emphasis in original), provides:

> (a) Decreases in rates
> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of

such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Wisconsin Statutes Section 133.14 provides:

All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by s. 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

Wisconsin Statutes Section 133.18 provides, in relevant part:

(1)(a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. Any recovery of treble damages shall, after trebling,

be reduced by any payments actually recovered under s. 133.14 for the same injury.

...

(2) A civil action for damages or recovery of payments under this chapter is barred unless commenced within 6 years after the cause of action accrued. When, in a civil class action, a class or subclass is decertified or a class or subclass certification is denied, the statute of limitations provided in this section is tolled as to those persons alleged to be members of the class or subclass for the period from the filing of the complaint first alleging the class or subclass until the decertification or denial.

...

(4) A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.

(5) Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date.

INTRODUCTION

For more than a century, the states have regulated retail sales of natural gas for consumptive use. At the urging of the states, Congress enacted the Natural Gas Act of 1938 ("NGA") to address exploitation of consumers by natural gas companies in the "regulatory void" of interstate commerce beyond the reach of state regulation. In an effort to fill this "regulatory void" while preserving all historic state powers, Congress, through the NGA, created a dual-regulatory system, with the states retaining their jurisdiction over retail

sales of natural gas for consumptive use, and federal jurisdiction limited to wholesale sales of natural gas in interstate commerce. This Court, in an unbroken line of opinions spanning over seven decades, has respected this dual-regulatory system created by Congress. The law on this issue is settled and supports the opinion below.

Despite this, and without addressing the long history of dual-regulation or the reasoning of the opinion below, petitioners argue that the court of appeals made new, radical law when it held that the NGA (as it existed between 2000 and 2002) precludes federal jurisdiction over retail sales of natural gas for consumptive use. Actions challenging retail sales of natural gas for consumptive use, made in furtherance of a conspiracy in violation of state antitrust laws, are not preempted by the NGA. This was the law for 75 years before the determination of the court of appeals, and no further review and unnecessary delay in redressing the plaintiffs' claims is warranted.

Petitioners vainly attempt to manufacture an "intolerable" conflict between the opinion below and the opinions of the Tennessee supreme court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) ("*Leggett*"), and the Nevada supreme court in *State ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013) ("*Reliant*"). Petitioners also attempt to repackage the careful analysis of the court of appeals as somehow contrary to prior opinions of this Court and, by this method, to challenge collaterally seven decades of opinions of this Court.

Both attempts fail. The opinion below follows the clear line established by Congress, and recognized on

numerous occasions by this Court, that federal jurisdiction under the NGA goes no farther than wholesale, interstate sales of natural gas, while the states have retained plenary authority over retail sales of natural gas. The opinions in *Leggett* and *Reliant*—which explicitly addressed challenges to wholesale, interstate sales of natural gas—only confirm that wholesale sales in interstate commerce are the province of the federal government. Neither case disturbs the settled law that, under the NGA, retail sales of natural gas for consumptive use are within the states' authority.

In addition, the review by this Court that petitioners seek would have only a narrow application. The Energy Policy Act of 2005 ("EPAct") amended the NGA in a way that has made the statutory analysis below meaningful only to the present litigants and academia. Any review by this Court would reach an incredibly limited niche issue: analysis of the NGA's historical preemption, under the statutory scheme in place between 2000 and 2002, of actions alleging a market-manipulation conspiracy in violation of state antitrust laws that exclusively challenge retail sales of natural gas for consumptive use. The petition therefore fails to present an important federal question for this Court to review.

In a transparent attempt to evade liability for their admittedly wrongful price manipulation, petitioners, supported by the *amicus curiae* groups (each of which includes petitioners or petitioners' counsel as members), try to transform the narrow, mainstream opinion of the court of appeals into a radical change in preemption law. However, the dual-regulatory system, which they claim would be intolerable, was deliberately created by Congress in 1938 and has functioned effectively for 75 years. The argument that the division

between federal and state regulatory jurisdiction—unchanged for over seven decades—will now suddenly be catastrophic for the natural gas industry is a disingenuous attempt by a small number of defendants to achieve personal immunity from state antitrust laws through judicial dismantling of the dual-regulatory system created by Congress. The argument is also strikingly similar to the industry complaints that reached this Court in the years immediately following passage of the NGA. This Court has rejected such assertions time and again, recognizing that it is not the task of this Court to grant petitioners a free pass for unlawful behavior at the expense of manifest Congressional intent, the historic powers of the states and decades of settled law. The petition should be denied.

STATEMENT OF THE CASE

In addition to the following, the Wisconsin Respondents[3] incorporate by reference the recitation of facts and reasoning in the opinion below. Pet. App. 1a-63a ("*Western States*").

Between 2000 and 2002, petitioners engaged in an unprecedented anti-competitive conspiracy to manipulate the retail natural gas market in Wisconsin. Pet. App. 12a-15a. They did so by multiple devices, including engaging in sham and illusory trades to create a false sense of demand, price volatility and shortages of the supply of natural gas. *Id.* One way petitioners accomplished this was by falsely reporting, to independent, third-party publications such as *Gas Daily* and *Inside FERC*, fictitious prices, volumes and

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[3] "Wisconsin Respondents" refers to the plaintiffs solely in the Wisconsin actions, as described below.

sales of natural gas. *Id.* Another way was to engage in "wash" sales (a prearranged set of transactions in which a sale of natural gas was countered by an offsetting transaction) falsely to increase the perception of demand for natural gas. *Id.*

The Wisconsin Respondents purchased natural gas for consumptive use. Pet. App. 19a-23a. They were damaged by petitioners' wrongful conduct because petitioners' anti-competitive manipulations drove up the retail price of natural gas far beyond what an honest market would have supported. *Id.* The Wisconsin Respondents brought three putative class actions pursuant to Wisconsin antitrust law: *Arandell-Wisconsin*,[4] *NewPage*[5] and *Arandell-Michigan*.[6] These putative class actions exclusively involve industrial and commercial entities which purchased natural gas at retail for their own consumption in Wisconsin between January 1, 2000, and October 31, 2002.[7] All three actions were eventually transferred to the United States District Court for the District of Nevada and consolidated for pretrial purposes with the other cases in MDL-1566, *In re Western States Wholesale Natural Gas Antitrust Litigation*. The district court exercised diversity jurisdiction over the actions. 28 U.S.C. § 1332(d)(2) (class action diversity).

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[4] Ninth Circuit Appeal No: 11-16869; Dist. Ct. Case No.: CV-S-07-1019-PMP (PAL) (D. Nev.).

[5] Ninth Circuit Appeal No: 11-16876; Dist. Ct. Case No.: CV-S-09-915-PMP (PAL) (D. Nev.).

[6] Ninth Circuit Appeal No: 11-16880; Dist. Ct. Case No.: 2:09-CV-1103-PMP (PAL) (D. Nev.).

[7] R. 1395 (*Arandell-Wisconsin*); R. 1544 (*NewPage*); R. 1611 (*Arandell-Michigan*). "R." refers to the Record on Appeal before the court of appeals.

Petitioners moved for summary judgment in these actions in December 2009, arguing that state antitrust claims are preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq.* On July 18, 2011, the district court granted summary judgment to petitioners on preemption grounds, and entered an amended final judgment on August 18, 2011. Pet. App. 119a-121a. Respondents timely appealed, and the United States Court of Appeals for the Ninth Circuit reversed the district court's judgment on April 10, 2013. *Id.* at 63a.

On August 26, 2013, petitioners brought before this Court a petition for writ of certiorari. On September 27, 2013, the Electric Power Supply Association,[8] Interstate Natural Gas Association of America,[9] Natural Gas Supply Association[10] and Western Power Trading

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[8] Its members include the parent of the Dynegy petitioners; the successor to petitioner Coral Energy Resources, L.P. (Cert. Pet. p. iv); and Dickstein Shapiro LLP, counsel for petitioner Duke Energy Trading and Marketing, L.L.C. *See* EPSA's Members, *available at* http://www.epsa.org/forms/CompanyFormPublic/showMembers (last visited Oct. 23, 2013).

[9] Its foundation members include the parent of petitioners CMS Field Services Inc., El Paso Merchant Energy L.P. and El Paso Corporation (Cert. Pet. p. iv-v.); and an affiliate of petitioner The Williams Companies, Inc.; its members include petitioner ONEOK, Inc., *See* INGAA Foundation Members and Members, *available at* http://www.ingaa.org/common/default.aspx?id=32 (listing the foundation members) and http://www.ingaa.org/Members/963.aspx (listing members) (last visited Oct. 23, 2013).

[10] The NGSA's membership is not publicly available, but Frans Everts, President of Shell Energy North America (U.S.), L.P., successor to petitioner Coral Energy, is the organization's Secretary-Treasurer. *See* Natural Gas Supply Association Secretary-Treasurer, *available at:* http://www.ngsa.org/about-ngsa/secretary-treasurer/ (last visited Oct. 23, 2013).

Forum[11] submitted a combined *amicus* brief, and the American Gas Association,[12] the Gas Processors Association[13] and the Washington Legal Foundation[14] submitted separate *amicus* briefs in support of the petition.

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[11] Its members include the parent of the Dynegy petitioners; the successor to petitioner Coral Energy; and petitioner Xcel Energy Inc. *See* Western Power Trading Forum, Membership and Staff, *available at* http://www.wptf.org/?q=node/3 (last visited Oct. 23, 2013).

[12] Its members include an affiliate of petitioner Reliant Energy; the parent of petitioner Duke Energy (Cert. Pet. pp. iv-v); petitioner ONEOK, Inc.; and petitioner Xcel Energy. *See* American Gas Association, Member Addresses and Places of Business, *available at* http://aga.org/membercenter/Pages/MembershipDirectory-links.aspx (last visited Oct. 23, 2013).

[13] Its members include an affiliate of petitioner Reliant Energy; an affiliate of Duke Energy's owner (Cert Pet. p. v); the parent of the CMS and El Paso petitioners (*id.* at iv-v.); ONEOK Partners, of which petitioner ONEOK, Inc. is the general partner; an affiliate of the successor to petitioner Coral Energy (*id.* at iv); an affiliate of petitioner The Williams Companies; and petitioner Xcel Energy. *See* Gas Processors Association, GPA Member Companies, *available at* https://www.gpaglobal.org/membership/companies/ (last visited Oct. 23, 2013).

[14] The Board Members of its Legal Policy Advisory Board include Coleen Klasmeier of Sidley Austin LLP, whose firm serves as counsel for the CMS petitioners, and Rob McKenna of Orrick, Herrington & Sutcliffe LLP, whose firm serves as counsel for the AEP petitioners. *See* Washington Legal Foundation, Legal Policy Advisory Board, *available at* http://www.wlf.org/org/legalpolicy.asp (last visited Oct. 23, 2013).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT ON THE QUESTION PRESENTED

A. A Demarcation Between Federal and State Authority Over the Natural Gas Industry Has Existed For 75 Years.

In the mid-1800s, natural gas was predominantly manufactured from coal and delivered locally within the same municipality in which it was produced.[15] Local governments deemed natural gas distribution to be a business affecting the public interest, and they regulated the rates charged by passing laws preventing abuse of market power by producers of natural gas.[16]

The advent of interstate pipeline technologies changed the nature of the industry and the manner of its regulation. Schwartz, *supra* note 16, at 558. Between 1911 and 1928, several states attempted to regulate interstate natural gas pipelines, which at the time were unregulated by the federal government. *History of Regulation, supra* note 15. In a series of decisions culminating in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), this Court held that states were prohibited, by the negative implications of the Commerce Clause of the United States Constitution (the "dormant commerce clause"), from directly burdening interstate commerce with respect to natural

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[15] Natural Gas Supply Ass'n, *Natural Gas Regulations: History of Regulation, available at* http://www.naturalgas.org/regulation/history.asp (amicus here) (last visited Oct. 23, 2013).

[16] *Id.*; *see also* David Schwartz, *The Natural Gas Industry: Lessons for the Future of the Carbon Dioxide Capture and Storage Industry*, 19 Stan. L. & Pol'y Rev. 550, 557-58 (2008).

gas, even in the absence of federal regulation. 273 U.S. at 88-90. What became known as the "*Attleboro* doctrine" provided that states could regulate retail natural gas sales, but not the wholesale, interstate market reserved for the federal government. *See id.*

The boom of interstate natural gas sales in the 1920s made the lack of interstate natural gas regulation increasingly problematic. *History of Regulation*, *supra* note 15. In 1935, the Federal Trade Commission issued a report outlining "numerous abuses" by natural gas companies. Schwartz, *supra* note 16, at 558. The report—and pressure from state regulatory commissions—prompted Congressional action, leading to passage of the Natural Gas Act of 1938 ("NGA"), codified at 15 U.S.C. § 717 *et seq. Id.*

The NGA's explicit purpose was to fill the "regulatory void" created by the *Attleboro* doctrine with respect to interstate sales of natural gas, establishing a codified, seamless *dual-regulatory* system wherein the states retained all historic powers over retail sales of natural gas for consumption, while the federal government regulated wholesale sales of natural gas in interstate commerce. *See Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (explaining that the NGA was intended by Congress to be "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare").[17]

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[17] *See also, e.g., Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506 (1942); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("*Panhandle I*") (explaining that the NGA, "though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement

Thus, Section 1(b) of the NGA established federal jurisdiction over "sale in interstate commerce of natural gas for resale for ultimate public consumption" but explicitly excluded federal jurisdiction over "*any other* transportation or sale of natural gas." 15 U.S.C. § 717(b) (emphasis added). As this Court recognized soon after passage of the NGA in *Panhandle I:*

> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage [in the NGA] was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to any other ... sale."

332 U.S. at 516 (quoting Section 1(b) of the NGA); *see also id.* at 517-18 (remarking that the NGA "had no purpose or effect to cut down state power.... The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way"); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 510 (1989) ("When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. It 'did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it

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and reinforce it in the gap created by the prior decisions"); *Fed. Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-04 (1949) ("*Panhandle II*"); *Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690 (1947); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 609-10 (1944) (explaining that the NGA "was designed to take no authority from State commissions and was so drawn as to complement and in no manner usurp State regulatory authority" (internal quotations omitted)).

contemplated the exercise of federal power as specified in the Act'" (quoting *Panhandle II*, 337 U.S. at 502-03)).

This Court articulated the limits of federal preemption of state law under the NGA in *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 84 (1963), in which this Court considered whether a Kansas state agency's order, requiring the Northern Natural Gas Company to purchase a proportional amount from each well connected to a common field, was preempted by the NGA. *Id.* at 88-89. In finding the order preempted by federal law, the Court explained that, pursuant to the NGA, wholesale sales of natural gas in interstate commerce fall under federal jurisdiction. *Id.* at 91.

This Court has repeatedly made clear, however, that the NGA did *not* disturb the states' historic role in regulating *retail* sales of natural gas for consumption. *See, e.g., Panhandle I*, 332 U.S. at 521 (explaining that Congressional intent to permit continued state regulation is "clear, in view of the [NGA's] historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over"); *id.* at 520 ("We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority").

Subsequent opinions of this Court confirmed the states' powers to regulate retail sales of natural gas for consumption. *See, e.g., Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943); *Hope Natural Gas Co.*, 320 U.S. at 609-10; *Interstate Natural Gas Co.*, 331 U.S. at 690; *Panhandle E. Pipe Line Co. v.*

Mich. Pub. Serv. Comm'n, 341 U.S. 329, 334 (1951); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 684 n.13 (1954); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 27 (1961); *La. Power & Light Co.*, 406 U.S. at 631 (1972); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 186 (1983); *Nw. Pipeline*, 489 U.S. at 506-07; *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) ("for a half century Congress has been aware of our conclusion in [*Panhandle I*]... and in the years following that decision has only reaffirmed the power of the States in this regard"). Thus, the dividing line between federal and state regulation of the natural gas industry has always been the nature of the sale.

In the 1970s, a natural gas shortage, perceived to have been partially the result of excessive, inflexible federal regulation, led to a series of Congressional acts deregulating the natural gas industry.[18] In response, FERC also engaged in deregulation efforts.[19] Certain

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[18] *See* Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. No. 95-621, 92 Stat. 3350 (1978) (replacing strict price controls with price ceilings that would change on a monthly basis based on inflation and other factors); Natural Gas Wellhead Decontrol Act of 1989 ("WDA"), Pub. L. No. 101-60, 103 Stat. 157 (1989) (removing "first sales" of natural gas from federal jurisdiction); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2866 (1992) (making sales of natural gas from Canadian and Mexican sellers to buyers in the United States "first sales" exempt from federal jurisdiction).

[19] *See* Pipeline Service Obligations and Revisions To Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267-02, 13,267 (Apr. 16, 1992) (requiring interstate pipelines to "unbundle" their transportation of natural gas from natural gas sales); *id.* at 13,270 (issuing blanket certificates to interstate pipelines allowing them to sell natural gas at market-based rates); Regulations Governing Blanket Market Certificates, 57 Fed. Reg. 57,952-01, 57,957-58 (Dec. 8, 1992) (issuing blanket

state and private actors mistakenly interpreted deregulation by Congress and FERC as constituting an invitation to the states to regulate sales of natural gas formerly subject to federal jurisdiction. For instance, in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Miss.* (*"Transcon"*), the Mississippi Oil and Gas Board argued that deregulation in the NGPA permitted Mississippi to regulate activity formerly subject to federal jurisdiction. 474 U.S. 409, 421-22 (1986). This Court held that federal law preempted Mississippi's regulation, because a "federal decision to forgo regulation in a given area [*i.e.*, deregulation in the NGPA] may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Id.* at 422 (citing *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)) (emphasis in original); *see also id.* ("The proper question is ... whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC").

Accordingly, from passage of the NGA in 1938 through the period in question (2000-2002), the federal government maintained exclusive jurisdiction over wholesale sales of natural gas in interstate commerce, and the states maintained their traditional jurisdiction over retail sales of natural gas for consumption.

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sales certificates for all other interstate, wholesale sales of natural gas).

B. The Court of Appeals Recognized and Applied Settled Law.

The court of appeals considered whether: "Section 5(a) of the NGA, which provides FERC with jurisdiction over any 'practice' affecting jurisdictional rates, preempt[s] state antitrust claims arising out of price manipulation associated with transactions falling outside of FERC's jurisdiction [because they concern retail sales for consumptive use]?" Pet. App. 24a. In answering this question, the court of appeals followed the longstanding demarcation between federal and state authority over sales of natural gas established by Congress in 1938 and recognized in numerous opinions of this Court over the past 75 years.

The court of appeals first examined the history of natural gas regulation as explained in *Panhandle I*, and the dual-regulatory system established by Congress in the NGA and recognized by this Court in *Panhandle I* and *Northwest Pipeline*. Pet. App. 24a-25a. The court observed that in Section 1(b) of the NGA, Congress deliberately and explicitly excluded retail sales of natural gas for consumptive use from FERC's jurisdiction. *Id.* at 17a ("The line of the statute [is] thus clear and complete. It cut[s] sharply and cleanly between sales for resale and ... sales for consumptive use" (quoting *Panhandle I*, 332 U.S. at 517)). Because the Wisconsin Respondents' claims, by class definition, exclusively challenge retail sales of natural gas for consumption, they fall on the state side of the jurisdictional line. Pet. App. 28a ("federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction").

Petitioners, while conceding that retail sales of natural gas for consumption are not subject to federal

jurisdiction, argued that the present claims are preempted because the general language in Section 5(a) of the NGA granting FERC authority over the practices of natural gas companies engaging in interstate wholesale sales supersedes the explicit language in Section 1(b) specifically excluding retail sales of natural gas for consumptive use from federal jurisdiction. Pet. App. 24a. In rejecting petitioners' argument, the court of appeals looked to this Court's opinion in *Northwest Pipeline* as an illustration of the Court's strict application of the jurisdictional limits of Section 1(b) in the face of arguments for a broad reading of federal authority under other provisions of the NGA.

In *Northwest Pipeline*, this Court held that a Kansas regulation—providing that rights to extract gas would be lost if pipelines unduly delayed extraction—was not barred by federal law. 489 U.S. at 497, 507-09. The pipelines in that case had claimed that Kansas's regulation would increase costs and thereby affect rates in wholesale sales in interstate commerce, and thus Kansas's regulation must be preempted by the NGA. In rejecting the pipelines' argument, this Court explained:

> To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situation.

Pet. App. 29a-30a (quoting *Nw. Pipeline*, 489 U.S. at 514).

In other words, federal law does not preempt state regulation of natural gas in areas traditionally subject to state regulation merely because state regulation might have a bleed-over impact on areas of the natural gas industry subject to federal jurisdiction. Any other approach would destroy the dual-regulatory role carefully established by Congress, nullify the jurisdictional provisions of the NGA and thwart Congressional intent. Pet. App. 31a-32a (explaining that petitioners' arguments lack a "conceptual core" that would distinguish federal from state regulatory authority, and would eviscerate the dual-regulatory role established by Congress).

Following this Court's clear precedent, the court of appeals concluded that state antitrust actions exclusively challenging *retail* sales of natural gas for consumptive use are not preempted by the NGA.[20] Pet. App. 38a-39a; *cf. Panhandle II*, 337 U.S. at 508 (explaining that the powers of FERC in Sections 4, 5

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[20] Petitioners argue that the actions are "directed at" practices affecting wholesale sales, and suggest a phantom "concession" supposedly made by respondents. Cert. Pet. 4, 8-9. Contrary to petitioners' unsupported assertion, the actions are, and have always been by class definition, explicitly "directed at" artificially inflated prices paid by class members in retail purchases of natural gas for consumption, and the Wisconsin Respondents have made no "concession" contrary to the allegations made in the Wisconsin complaints. *See supra* Statement of the Case. Petitioners' argument is also irrelevant, because the test is whether the sales in question are wholesale or retail; suits challenging wholesale natural gas transactions in interstate commerce are preempted, while suits limited to retail sales of natural gas for consumption are not.

and 7 of the NGA are subject to the jurisdictional limitations in Section 1(b)).[21]

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), cases cited by petitioners, both involved situations where states had attempted to vault across the federal-state jurisdictional divide into areas subject to FERC's jurisdiction, and do not impact the issue presented here.

In *Schneidewind*, this Court struck down a Michigan law that granted Michigan veto power over the issuance of securities by natural gas companies unless such issuance was for a "lawful purpose" and "essential to the successful carrying out of" that purpose, and allowed Michigan unfettered power to attach conditions to any such issuance. 485 U.S. at 297-98. The overreaching Michigan law intruded, *inter alia*, upon FERC's powers to: (1) "calculate a reasonable rate of return on invested capital" in wholesale sales of natural gas in interstate commerce (under Section 4(a) of the NGA) and; (2) issue certificates of "public convenience and necessity" before a company engaged in wholesale, interstate sales "constructs, extends, acquires, or operates any facility" for interstate transportation or

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[21] *See also* William F. Demarest, Jr., *"Traditional" NGA Jurisdictional Limits Constrain FERC's Market Manipulation Authority*, 31 Energy L. J. 471, 471-72 (2010) ("Even a cursory review of the court cases dealing with the Commission's exercise of delegated authority discloses a number of decisions where the lawfulness of the exercise of regulatory power was resolved on the basis of the scope of the Commission's *jurisdiction* [pursuant to Section 1(b)]" as opposed to the enumerated powers in other sections of the NGA (emphasis added)).

wholesale sales of natural gas in interstate commerce (under section 7 of the NGA). *Id.* at 301-02; *see also Nw. Pipeline*, 489 U.S. at 513 n.10 (explaining that the Michigan statute in *Schneidewind* "could not plausibly be said to operate in a field expressly reserved by the NGA to the States").

Similarly, in *Mississippi Power*, this Court held that Mississippi lacked the power to second-guess the wholesale electricity rates set by FERC charged by a nuclear power plant. 487 U.S. at 362-63, 373-74 (concluding that Mississippi lacked authority to investigate the propriety of wholesale rates explicitly set by FERC after extensive hearings); *see also Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47-48 (2003) (explaining *Mississippi Power* as a case in which the states tried to "trap" wholesale costs by denying power generators the ability to recover wholesale costs in retail rates); Pet App. 36a (rejecting petitioners' assertion that the market manipulation here is analogous to FERC's authority to regulate practices affecting wholesale rates in *Mississippi Power*).

Neither *Schneidewind* nor *Mississippi Power* disturbed the contours of the dual-regulatory system regarding natural gas regulation established by Congress and recognized by this Court, and neither case is at odds with the opinion of the court of appeals.[22]

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[22] *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), also has no bearing here, as it involved a challenge by plaintiffs to an area (locomotive design parameters) where Congress had affirmatively and exclusively occupied the *entire* field. *See id.* at 1266. By contrast, the present case involves an area of traditional state regulation *deliberately reserved to the states* by Congress in the NGA.

C. The Tennessee and Nevada Supreme Court Opinions Do Not Conflict With the Opinion of the Court of Appeals.

The opinions of the supreme courts of Tennessee and Nevada in *Leggett* and *Reliant* also reside comfortably within the wholesale-retail demarcation established by Congress in 1938. In *Leggett*, the Tennessee supreme court held that Congressional deregulation of the natural gas industry did not invite state antitrust actions challenging wholesale sales of natural gas made by regulated utilities. 308 S.W.3d at 871-72. The Tennessee supreme court found that plaintiffs *conceded that they were challenging wholesale sales on the federal side of the demarcation line,* and thus traditionally subject to FERC's jurisdiction, but considered whether the WDA and related deregulatory acts of Congress signaled (an implied) Congressional intent to re-delegate traditional federal authority back to the states.[23] The court in *Leggett* held that Congress intended to leave the deregulated portions of the *wholesale* natural gas market in question unoccupied by any regulator, and thus held that the plaintiffs' claims were preempted by federal law. *Id.* at 861 (following *Transcon*'s reasoning that a "federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate") (quoting *Transcon*, 474 U.S. at 422 (emphasis in

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[23] "Plaintiffs ... argue that ... especially in light of the deregulatory steps taken in the WDA—their claims are not pre-empted... [and] assert that, due to the enactment of the WDA, many of the *wholesale* natural gas transactions that were subject to FERC jurisdiction at the time of *Transcon* and *Northern Natural* no longer are." *Id.* at 864-65 (emphasis added).

Transcon)). In so doing, the *Leggett* court again confirmed the federal-state divide created by Congress in the NGA (rooted in the *Attleboro* doctrine) and recognized by numerous opinions of this Court. *See* 308 S.W.3d at 871.

Similarly, in *Reliant*, the Nevada supreme court held that *wholesale* sales of natural gas—that FERC had determined in an investigation were jurisdictional sales—could not be challenged by a state antitrust action. 289 P.3d at 1188, 1193. Plaintiffs in *Reliant conceded that Reliant's sales were wholesale sales historically subject to federal jurisdiction*, but argued that preemption was "inapplicable ... because even though the field historically had been preempted, at the time of the alleged market manipulation, the field had been deregulated [by such acts of Congress as the WDA] and was no longer subject to FERC control." *Id.* at 1189. Relying heavily on *Leggett*, the court in *Reliant* concluded that Congress had not invited state intrusion upon historically federal (*i.e.*, wholesale) sales of natural gas "through the use of purposeful deregulation," and held that the action was barred by federal law. *Id.* at 1193.

The opinions in *Leggett* and *Reliant* therefore stand only for the proposition that, absent clear Congressional intent to delegate authority over wholesale, interstate natural gas commerce to the states, state actions challenging *wholesale* sales of natural gas remain preempted by federal law even after federal deregulation within the wholesale natural gas industry. *Cf.* Brief for Respondent 20-21 & n.5, *Nevada v. Reliant Energy, Inc.*, 133 S. Ct. 2853 (2013) (No. 12-980), 2013 WL 2428988 (filed by then-respondent Reliant Energy Services, Inc., petitioner in this action) ("Lower courts have faithfully applied this Court's

teaching to hold preempted state antitrust claims that intrude on FERC's exclusive jurisdiction over *wholesale* natural-gas rates. No court has held to the contrary in a case challenging *only transactions within FERC's jurisdiction*" (internal footnote citing *Leggett* and comparable cases omitted (emphasis added)); *see also id.* at 10, 13-14 (stressing that "no court disagrees with the Nevada Supreme Court's holding [in *Reliant*] that antitrust claims challenging *wholesale* transactions *within FERC's jurisdiction* are preempted" and arguing that, if the facts of *Reliant* had been presented to the court of appeals below in this matter, the court of appeals would have dismissed the action on preemption grounds (first emphasis added)).

There is no genuine conflict between the holding below and the holdings in *Leggett* and *Reliant*. *See* Eugene Gressman, *et al.*, *Supreme Court Practice* 241 (9th ed. 2007) (explaining that, for certiorari to be granted, there "must be a real or intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta" (internal quotation omitted)). To the contrary, the opinion below, *Leggett* and *Reliant* all represent fact-bound applications involving transactions falling on different sides of the same demarcation line between federal and state power over the natural gas industry established by Congress and articulated clearly in numerous opinions of this Court.[24]

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[24] As a backup argument, petitioners make a half-hearted attempt to manufacture a conflict on the issue of the *presumption* to be applied in preemption cases, arguing that *Leggett* applied a *presumption of preemption* in suits challenging wholesale sales of natural gas, and the opinion below invoked a *presumption of no preemption* in suits challenging retail sales of natural gas for consumption. Cert. Pet. 16. This is a distinction without a difference. What matters is the limitation of federal jurisdiction in

II. ADDITIONALLY, THE PETITION FAILS TO IDENTIFY AN IMPORTANT FEDERAL QUESTION ON THE NARROW ISSUE PRESENTED

In 2005, Congress amended the NGA. The impact of any new pronouncement of law by this Court on the question presented under the former NGA (as it existed during the 2000 to 2002 period relevant to the pending actions) would consequently be limited to the parties in present litigation. In addition to the lack of any conflict in the law (*see supra* Section I), the legal issues implicated by the petition are narrow and present no important federal question. *See* Supreme Court Rule 10(a),(c) (explaining that review by the Court is generally warranted only if there is an "important federal question").

A. Amendments To the Natural Gas Act After the Period In Question Here Have Substantially Altered the Scope of FERC's Regulatory Powers.

Between 2000 and 2002, petitioners engaged in an unprecedented conspiracy in restraint of trade, a fact recognized by Congress, FERC and the courts.[25] In

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Section 1(b) of the NGA. Actions challenging *wholesale* sales of natural gas, like *Leggett* and *Reliant*, are preempted as a matter of law, and actions limited to *retail* sales, like the actions below, are not.

[25] *See, e.g.*, 151 Cong. Rec. S. 9344 (July 29, 2005) (containing the comments of Senator Cantwell, describing the unethical manipulation of the natural gas market between 2000-2002 as historically "disastrous"); Testimony of Joseph Kelliher, FERC Chairman, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (Dec. 12, 2007) ("Kelliher Testimony") *available at* http://www.ferc.gov/eventcalendar/Files/20071212102420-kelliher-testimony-12-12-07.pdf (last visited Oct. 23, 2013)

response, FERC conducted an investigation into manipulation of the energy markets and in 2003 issued a detailed report ("FERC Report").[26] The FERC Report explained that natural gas prices "rose to extraordinary levels." Pet. App. 14a (quoting the FERC Report). FERC concluded that a "fatally flawed market design" stemming "from efforts to manipulate price indices compiled by trade publications" was a substantial factor in causing the rise in natural gas prices. FERC Report at ES-1. As a result of the FERC Report and the systemic anti-competitive behavior it revealed,[27] FERC formally asked Congress to amend the NGA and grant FERC "new regulatory tools."[28]

(describing the unparalleled market manipulation between 2000 and 2002); Pet. App. 14a (recounting the results of a FERC fact-finding investigation that concluded that natural gas prices between 2000 and 2002 "rose to extraordinary levels").

[26] Federal Energy Regulatory Commission, *Final Report on Price Manipulation In Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA0-2-2-000, (Mar. 2003).

[27] *See* FERC Report at ES-17 (recommending that Congress give direct authority to FERC or another federal agency to ensure that trading platforms for wholesale sales of electric energy and natural gas in interstate commerce are "monitored and provide price market information that is necessary for price discovery and competitive energy markets").

[28] Kelliher Testimony; *see also* Federal Energy Regulatory Commission, Conference on Enforcement Policy AD07-13-000 (Nov. 14, 2007) (statement of FERC Chairman Kelliher), *available at* http://www.ferc.gov/media/statements-speeches/kelliher/2007/11-14-07-kelliher.pdf (last visited Oct. 23, 2013) (acknowledging that FERC lacked regulatory authority to guard against market manipulation before Congress granted FERC additional powers in 2005 "inspired in large part by the market manipulation that occurred in 2000-2001").

Congress responded by enacting the EPAct.[29] The EPAct significantly amended the NGA, granting FERC, *on a prospective basis only*, dramatic new powers.[30] As FERC explained in 2007, "[b]efore the Energy Policy Act, FERC did *not* have all the tools it needed to be a strong enforcement agency" and lacked "express authority [under the NGA] to prohibit market manipulation." Kelliher Testimony (emphasis added). FERC's powers under the amended NGA gave it, for the first time, the "tools we needed" to "protect consumers from market manipulation," providing "strong grounding for our efforts to oversee *wholesale* energy markets." *Id.* (emphasis added).

Since passage of the EPAct, FERC has operated under statutory parameters substantially different from its powers during the period in question here (2000-2002). *Cf. Western States*, Pet. App. 37a-38a (acknowledging the principle of statutory construction that courts should not deem Congressional acts to be

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[29] Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, 119 Stat. 594 (2005). *See also* 151 Cong. Rec. S. 9344 (July 29, 2005) ("This bill also takes steps to respond to the disastrous western energy crisis.... This Energy bill puts in place *the first ever* broad prohibition on manipulation of electricity and natural gas markets" (statements of Senator Cantwell) (emphasis added)).

[30] *See, e.g.*, EPAct at § 315, 119 Stat. at 692 (amending the NGA to give FERC authority to prohibit manipulative or deceptive conduct, modeled on 10(b) of the Securities Exchange Act of 1934); Kelliher Testimony (explaining that the EPAct significantly amended the NGA by (a) prohibiting entities from engaging in deceptive conduct in activities subject to FERC's jurisdiction; (b) directing FERC to facilitate price transparency in jurisdictional markets and granting FERC authority to require market participants to disseminate information about the price and availability of natural gas; and (c) granting FERC enhanced civil penalty authority to assist FERC in its new monitoring rules).

superfluous, and thus reasoning that Congress's act in passing the EPAct, granting FERC new authority, was prompted by the fact that FERC did not have these powers prior to 2005).[31]

B. The Amendments To the Natural Gas Act and Other Unique Factors Narrowly Confine the Question Presented To the Named Conspirators In Pending Actions.

The amendments to the NGA in 2005 have made FERC today a different regulatory agency than it was in the period in question here (2000-2002). For instance, if petitioners' wrongful conduct occurred today and resulted in a state lawsuit in which a preemption issue was raised, analysis of the scope of FERC's authority would implicate interpretation of the new Section 4A of the NGA, which prohibits manipulative or deceptive devices in connection with wholesale sales of natural gas in interstate commerce. *See* EPAct at § 315, 119 Stat. at 692 (2005) (creating the new Section 4A of the NGA, codified at 15 U.S.C. § 717c-1). Any further articulation by this Court of the preemptive powers of the "old FERC" under the *prior* version of the NGA will not determine the preemptive powers of the "new FERC" in similar situations going forward under the *current* version of the NGA. Thus, the review

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[31] Nevertheless, there is nothing in the EPAct or its legislative history to indicate Congressional intent to deprive the states of their historic authority over retail sales of natural gas for consumptive use, or to make FERC a regulatory enforcer of the important public policy objectives achieved by antitrust laws. *Cf. Goldfarb v. Va. State Bar,* 421 U.S. 773, 787 (1975) (explaining that, because antitrust laws reflect overarching and fundamental policies, there is a "heavy presumption" that Congress did not repeal antitrust laws by implication in legislation granting an agency authority over given commercial activity).

petitioners seek from this Court of the federal-state demarcation of authority over the natural gas industry in antitrust cases during the relevant time period is dated and relevant only to the parties to this litigation.

Additionally, the limitations period for bringing antitrust suits under the former NGA (prior to the statute's amendment in the EPAct) has passed.[32] Due to the passage of time, any interpretation of antitrust preemption issues under the former NGA would only impact suits already pending and the named defendants in these suits. The opinion below has no significance for any entity other than those named defendants in pending litigation whose participation in a conspiracy to manipulate retail natural gas markets between 2000 and 2002 is proven at trial.

Therefore, while the preemption question here is of obvious significance to the present litigants, the issue presented is incredibly narrow and the scope of the petition is, in reality, limited to those litigants. The petition thus fails to present an important federal question. *See Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) (explaining that only issues important to the public, as opposed to merely the parties involved in the lawsuit at bar, are worthy of review by this Court); *see also Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (explaining that a federal question must be "beyond the academic or the episodic" to warrant granting a petition for certiorari review); *Caldwell v. Quarterman*, 549 U.S. 970, 127 S. Ct. 431, 432 (2006) (Stevens, J., respecting denial of certiorari) (explaining that denial of certiorari is

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[32] *See, e.g.*, Wis. Stat. § 133.18 (establishing a six-year period for antitrust violations in Wisconsin).

appropriate when the opinion in question is a "narrow holding... unlikely to produce injustice").

III. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 1(b) OF THE NATURAL GAS ACT PRECLUDES FEDERAL JURISDICTION OVER RETAIL SALES OF NATURAL GAS FOR CONSUMPTION

The court of appeals came to the only possible answer to the question before it: the *general* language in Section 5(a) of the NGA, authorizing FERC's regulation of "practices" in wholesale sales, cannot nullify Section 1(b)'s *specific* language, carving retail sales for consumptive use out of FERC's jurisdiction and leaving those sales to historic state regulation.

In reaching this result, the court of appeals advanced multiple reasons supporting the conclusion that the general language of Section 5(a) the pre-EPAct NGA could not possibly negate Section 1(b)'s specific language limiting federal jurisdiction.[33] Petitioners

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[33] They include: (1) this Court's instruction that courts should not lightly find that the states' historic police powers are superseded by federal law; (2) the explicit carve-out for the states' benefit in Section 1(b) of the NGA of retail sales for consumptive use; (3) this Court's opinion in *Panhandle I* explaining the importance of this carve-out and this Court's opinion in *Northwest Pipeline* explaining the careful division of federal and state authority over the natural gas industry created by Congress; (4) the court of appeals' own careful analysis and rejection in *E&J Gallo Winery v. Encana Corp.*, 503 F.3d 1027 (9th Cir. 2007), of the notion that rates published by independent third-party indices must be considered "filed rates" approved by FERC and thus exempt from state regulation; (5) the principle of statutory construction that provisions should be read not in isolation, but within the context of the structure of the statute of which the provision is part; (6) opinions of this Court and others reading Section 5(a) of the NGA narrowly, so as to comport with Section 1(b); (7) the principle that

mostly ignore the analysis of the court of appeals. Contrary to petitioners' assertion, there is nothing novel in the conclusion of the court of appeals, as it tracks numerous opinions of this Court on the same issue. *See, e.g.*, *Panhandle II*, 337 U.S. at 508 (explaining that the enumerated powers in Sections 4, 5 and 7 of the NGA could not have been intended to "swallow [the jurisdictional limitations in Section 1(b) and] thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words 'subject to the jurisdiction' [in Section 1(b)] makes clear to us the intent to keep the Commission's hands out of the excepted local matters"); *see also supra* Section I.A.

For example, as the court of appeals noted, if the word "practices" in Section 5(a) of the NGA were defined as broadly as petitioners insist—to prohibit state regulation of retail sales simply because those sales involved prices derived from unlawful conduct that might also independently have been committed with respect to wholesale sales in interstate commerce—federal power would subsume state power, and would occupy the entire natural gas field. Pet. App. 31a-32a (explaining that under the broad reading of Section 5(a) of the NGA proposed by petitioners, "there is no conceptual core delineating transactions falling within FERC's jurisdiction and transactions outside of FERC's jurisdiction," and that, under petitioners' view, FERC would assume jurisdiction over

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Congressional acts are not to be deemed superfluous, and thus passage of the EPAct by Congress is presumed to be prompted by a need to grant FERC additional powers it did not already have; and (8) FERC's own Code of Conduct, which explains that FERC does not have authority over retail sales for consumptive use, like those in question here. Pet. App. 23a-39a.

the entire natural gas industry (internal quotation omitted)). Petitioners' approach would nullify the jurisdictional limits of federal power embodied in Section 1(b) of the NGA and would unravel the dual-regulatory system intentionally established and maintained by Congress. *See id.*; *cf. Am. Gas Ass'n. v. F.E.R.C.*, 912 F.2d 1496, 1506 (D.C. Cir. 1990) (characterizing a similar argument—that NGA Section 5(a) grants FERC "jurisdiction over non-jurisdictional contracts"—advanced by then-petitioner (now *amicus curiae*) the American Gas Association, as "oxymoron[ic]").

The court of appeals painstakingly followed the settled demarcation between the federal and state regulatory spheres in the natural gas industry and came to the only result possible on the facts before it.[34] There is no need for this Court to review the decision below.

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[34] Petitioners assert that the opinion in *Gallo* was the linchpin of the lower court's decision. This is simply false. The court of appeals discussed *Gallo* in remarking that state-law antitrust actions are not *prima facie* preempted by the NGA. Pet. App. 25a-36a. *Gallo* focused on whether the "filed rate doctrine," an affirmative defense not presented to the Court in the petition, barred state antitrust claims. 503 F.3d at 1043 (explaining "First, we must consider whether the Filed Rate Doctrine can bar damage claims based on an index ... that is not a rate itself" and second, assuming *arguendo* an affirmative answer to the first question, whether the damage claims are barred even though "Gallo is making retail purchases *which are outside FERC's jurisdiction*" (emphasis added)).

IV. PETITIONERS' CHALLENGE TO THE DUAL-REGULATORY SYSTEM CREATED BY CONGRESS DOES NOT MERIT REVIEW BY THIS COURT

Petitioners' assertion that the opinion below will fragment the natural gas industry is utterly without basis. The opinion of the court of appeals did not alter the dual-regulatory system established by Congress over the natural gas industry, which has been in place for 75 years without the disastrous consequences predicted by petitioners.

Petitioners' insistence that one national standard under FERC's banner is required is also disingenuous. FERC has acknowledged that it did not have jurisdiction to combat anti-competitive market manipulation in retail sales of natural gas for consumption during the 2000-2002 time period in question. *See, e.g.*, Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, ¶ 21 (Nov. 26, 2003) (acknowledging that FERC does not and cannot regulate the entire natural gas market but only exercises its "authority over that portion of the gas market *which is within its jurisdiction* to prevent the manipulation of prices" (emphasis added)); Pet. App. 36a-38a (citing FERC's Code of Conduct, which explains that FERC does not have authority over non-jurisdictional sales like the retail sales for consumptive use in question here); *see also supra* Section II.B.[35]

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[35] Petitioners obfuscate the conduct in question to imply that their manipulations fell under FERC's authority. Petitioners manipulated the natural gas markets to inflate prices well beyond what normal markets would bear, and reported these manipulated rates to independent third-party publications, which drew on them to formulate and publish price indices, that then were presented as indicative of prevailing "market rates" for natural gas. Petitioners

Petitioners do not genuinely fear future harm to the natural gas industry, nor do they posit any basis for such fear. They simply seek personal immunity from redress for their unprecedented manipulation between 2000 and 2002 of the retail natural gas market. *Cf. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (explaining that courts should not create a "no man's land" in the regulation of natural gas, given Congress' intent to develop a "comprehensive and effective" dual-regulatory system). For their own unique, self-serving interests, including apparently to delay having to answer for their wrongdoing at trial, petitioners cloak their attempt to escape responsibility for their collusion in principles of federalism. In so doing, they trample over the express Congressional intent to create an effective, clear, workable dual-regulatory system in the NGA. *Cf. Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) ("[O]ur decisions have squarely rejected the view ... that the scope of [federal] jurisdiction over interstate sales of gas ... is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis").

This transparent ploy to muddle the argument, and inject ambiguity and confusion into an area of law that

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speciously suggest that they sold at rates reflective of market conditions, and thus met the terms of their blanket certificates. However, FERC did not require petitioners to manipulate the markets, and what the Ninth Circuit found in *Gallo* holds true—a manipulated rate is by no means FERC-approved. *Gallo*, 503 F.3d at 1048.

is settled and clear, should not succeed. As this Court explained in *Panhandle I:*

> The [vital state interest in regulating intrastate natural gas activity] lead[s] to the conclusion that the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective. But in this case, in addition to those considerations taken independently, the policy which we think Congress has clearly delineated [in the NGA] for permitting and supporting state regulation removes any necessity for determining the effect of the commerce clause independently of action by Congress and taken as operative in its silence. The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage.

332 U.S. at 523-24. Petitioners' attempt to subvert Congressional intent to further their desire to avoid liability for their wrongful acts cannot be countenanced.

The Court has clearly stated that its role is not to second-guess the division of regulatory authority established by Congress. As this Court explained in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978):

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the

> meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.... [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches.

CONCLUSION

For the reasons stated, the Court should deny the petition.

Respectfully submitted,

October 28, 2013.

ROBERT L. GEGIOS*
STEPHEN D. R. TAYLOR
RYAN M. BILLINGS
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110
rgegios@kmksc.com
Counsel for
The Wisconsin Respondents
**Counsel of Record*

REPLY BRIEF

No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

NEAL KUMAR KATYAL*
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners
*Counsel of Record

[additional counsel listed on inside cover]

Additional counsel:

MICHAEL J. KASS
DOUGLAS R. TRIBBLE
KEVIN M. FONG
PILLSBURY WINTHROP
SHAW PITTMAN LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1000

Counsel for the defendant Dynegy entities

JOSHUA D. LICHTMAN
FULBRIGHT &
JAWORSKI L.L.P.
555 South Flower Street,
Forty-First Floor
Los Angeles, CA 90071
(213) 892-9200

Counsel for Shell Energy North America (U.S.), L.P.

ROXANNA A. MANUEL
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
865 S. Figueroa St., 10th
Floor
Los Angeles, CA 90017
(213) 443-3000

Counsel for Shell Energy North America (U.S.), L.P.

MARK E. HADDAD
MICHELLE B. GOODMAN
NITIN REDDY
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the defendant CMS entities

J. GREGORY COPELAND
MARK R. ROBECK
AARON STREETT
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for GenOn Energy, Inc.

OLIVER S. HOWARD
AMELIA A. FOGLEMAN
CRAIG A. FITZGERALD
GABLE GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4800

Counsel for the defendant ONEOK entities

BRENT A. BENOIT
STACY WILLIAMS
LOCKE LORD LLP
3400 J.P. Morgan Chase Tower
600 Travis
Houston, TX 77002
(713) 226-1200

Counsel for El Paso LLC

SARAH JANE GILLETT
HALL, ESTILL, HARDWICK, GABLE, GOLDEN, & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, OK 74103-3706
(918) 594-0400

Counsel for the defendant Williams and WPX entities

MICHAEL JOHN MIGUEL
KASOWITZ BENSON TORRES & FRIEDMAN LLP
2029 Century Park East
Suite 750
Los Angeles, California 90067
(424) 288-7900

Counsel for e prime, Inc.

STEVEN J. ROUTH
ORRICK, HERRINGTON, & SUTCLIFFE, L.L.P.
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for the defendant AEP entities

JOEL B. KLEINMAN
ADAM PROUJANSKY
LISA M. KAAS
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006
(202) 420-2200

Counsel for Duke Energy Trading and Marketing, L.L.C.

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INTRODUCTION

The decision below squarely conflicts with the decisions of two state courts of last resort and is irreconcilable with this Court's straightforward rule for analyzing preemption: When a state-law claim is "aimed at" a subject Congress committed to federal control, that claim is preempted. *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1268 (2012).

Applying this rule, the Supreme Courts of Tennessee and Nevada found the Natural Gas Act preempted state-law claims in cases arising out of the same facts at issue here. In both cases, as here, plaintiffs were retail customers; Respondents are flatly wrong to assert the contrary. And in both cases plaintiffs challenged the same practices at issue here—index manipulation, wash trading, and churning. The only material difference between those cases and this one was the preemption analysis. The Tennessee and Nevada courts asked whether plaintiffs' state-law claims were aimed at a part of the gas market subject to federal control. The Ninth Circuit, by contrast, focused not on what activity plaintiffs aimed to regulate, but on the type of *transaction* in which they allegedly suffered damage. The split between that formalistic approach and the practical one adopted by this Court, and two state high courts, is stark. This Court should resolve it.

Tellingly, the principal brief in opposition does not defend the Ninth Circuit's transaction-based approach. Instead, Respondents flee from the record by insisting that this case is about practices that had only an "incidental," "indirect" effect on wholesale gas rates. Learjet Opp. i, 5, 8. That, they theorize, is why the Ninth Circuit held there was no preemption,

and why its holding aligns with this Court's precedent. *Id.* at 20.

Respondents' assertions are factually incorrect. The District Court found based on extensive—and undisputed—record evidence that *"[n]o genuine issue of material fact remains* that [index-manipulation] practices *directly affect the jurisdictional rate*" because indices are the very "method by which [wholesale] rates are set." Pet. App. 110a-111a (emphases added). It therefore concluded that FERC had exclusive jurisdiction over the practices. Respondents did not challenge that factual predicate on appeal, and the Ninth Circuit did not take issue with it. Instead, the panel announced an erroneous legal rule—state-law claims are not preempted if the plaintiffs bought gas in retail transactions—that rendered the direct-effects question irrelevant. Respondents cannot eliminate the conflict by rewriting the Ninth Circuit's decision.

Respondents' other arguments also fail. They say the Energy Policy Act of 2005 (EPAct) changed the scope of FERC's authority such that the Ninth Circuit's holding will not apply in future cases. That is wrong three times over. First, the EPAct did not change FERC's ability to regulate alleged deceptive practices by "jurisdictional" companies like Petitioners; it merely expanded FERC's authority so it could also regulate deceptive practices by "any entity." Second, the EPAct did not change the fact that FERC can regulate only practices that directly affect jurisdictional rates. The EPAct thus does nothing to blunt the Ninth Circuit's erroneous holding; under the panel's approach, every state can compete with FERC to regulate anytime a deceptive practice

directly affects wholesale rates but also happens to affect *retail* rates.

Finally, the Ninth Circuit's holding is not limited to deceptive-practices cases, and so the EPAct's provision forbidding market manipulation could not have neutralized that holding even if the statute said what Respondents claim. To the contrary, as Petitioners' *amici* explain, the Ninth Circuit's rule authorizes states to impose their idiosyncratic regulatory regimes on gas and power companies in a wide range of areas that, until now, were regulated only by FERC. That is a recipe for regulatory chaos across two major industries, both crucial to the U.S. economy. The writ should be granted, or, at a minimum, the Court should call for the views of the Solicitor General.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CANNOT BE SQUARED WITH *LEGGETT* OR *JOHNSON*.

Respondents argue that neither *Leggett* nor *Johnson* involved retail transactions, and that those cases accordingly cannot conflict with the decision below. Learjet Opp. 10-12; Wisconsin Opp. 22-24. Respondents are incorrect.

1. Respondents get *Leggett*'s facts wrong. The Tennessee Supreme Court identified the plaintiffs as "retail customers." *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 849 (Tenn. 2010). Just like in this case, those plaintiffs alleged that practices of index manipulation, "churning," and "wash trades" caused them to pay higher "retail" prices. *Id.* at 848-49. And just like Respondents here, the *Leggett* plaintiffs argued that "their claims are not pre-empted because they are based on consumer transactions"—i.e., retail purchases. *Id.* at 872. But *Leggett*, unlike

the Ninth Circuit, rejected that argument. It explained that though plaintiffs were retail consumers, their claims were nonetheless preempted because they "necessarily intrude[d] on the federal domain, even if the transactions to which they were direct parties fell outside the scope of the NGA." *Id.*

Respondents cite that passage to claim that "the Tennessee Supreme Court deemed the plaintiffs to be 'wholesale' purchasers." Learjet Opp. 10. It did no such thing. It instead held that the type of transaction in which plaintiffs bought gas *did not matter*; all that mattered was that their claims "necessarily intrude[d] on the federal domain." 308 S.W.3d at 872.

That is the polar opposite of the Ninth Circuit's holding. Respondents here brought state-law claims that "necessarily intrude on the federal domain" by seeking to impose liability for practices that FERC has the power to regulate—and does regulate—because they directly affect wholesale rates. Those claims would be preempted in Tennessee. This conflict on an important preemption question merits this Court's review.

2. Respondents likewise are wrong about the facts of *State ex rel. Johnson* v. *Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012). The *Johnson* plaintiffs, too, were retail purchasers who alleged that they paid higher retail prices because of churning and similar alleged manipulations. *See id.* at 1188 & n.2. Indeed, the first paragraph of the *Johnson* plaintiffs' petition for certiorari stated: "The principal allegation is that [defendants'] * * * manipulative natural gas trading activity * * * caused substantial overcharges in *retail natural gas and electricity prices paid by Southern Nevada consumers.*" Pet. for

Certiorari 1, No. 12-980, 2012 WL 7037173 (Dec. 26, 2012) (emphasis added).

That fact destroys Respondents' argument. They nonetheless point triumphantly at Reliant's statement in *Johnson* that plaintiffs' claims there "challeng[ed] only wholesale transactions." Learjet Opp. 12. They miss the point of that statement altogether. Reliant was saying the same thing Petitioners are saying here: Even though plaintiffs allegedly suffered damage in retail transactions, their claims are preempted because what they *challenge* are practices affecting the wholesale market. The Nevada court recognized as much. The Ninth Circuit did not.

As Reliant said, the Ninth Circuit's field-preemption framework "is at odds with the decision[ ] of * * * the Nevada Supreme Court." Br. in Opp. 15, No. 12-980, 2013 WL 2428988 (June 3, 2013). This case—wrongly decided, unlike *Johnson*—"present[s] an ideal vehicle to resolve that conflict[.]" *Id.*

II. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT.

Respondents likewise fail to harmonize the Ninth Circuit's decision with this Court's decisions in cases like *Kurns* and *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988).

1. The Learjet Respondents try to justify the Ninth Circuit's holding by shoehorning it into the "indirect effects" box. Their efforts fail.

a. NGA Section 5 gives the federal government exclusive control over gas-company practices that affect jurisdictional rates. 15 U.S.C. § 717d(a). Courts have recognized that there must be some limit on that principle since most anything a gas

company does can be understood to affect rates in some attenuated way. Courts accordingly have held that " 'practices' is 'limited to those methods or ways of doing things * * * that directly affect the rate" and does not include "all those remote things * * * that might in some sense indirectly or ultimately do so." Pet. App. 105a (quoting *California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004)); *accord Northwest Cent. Pipeline* v. *State Corp. Comm'n*, 489 U.S. 493 (1989).

b. Respondents insist that this is an indirect-effects case. Learjet Opp. i, 5, 8, 18-22. They say the conduct they seek to regulate through lawsuits "had at most an incidental effect on wholesale rates." *Id.* at i. And they depict the Ninth Circuit's decision as an indirect-effects holding that "resides comfortably in the mainstream" of this Court's "incidental or indirect effect" decisions, including *Northwest Central*. *Id.* at 5.

But Respondents' premise is pure fiction. In fact, it was undisputed below that the practices at issue had a direct effect on wholesale rates. The District Court surveyed the summary-judgment record and found that the indices Petitioners allegedly manipulated were used to price " 'most transactions subject to FERC's jurisdictional authority.' " Pet. App. 111a n.19. Indeed, Respondents' own expert stated that "it can be said that the prices that were the subject of the manipulation *are* the prices of natural gas in this country," including wholesale prices. *Id.* at 112a & n.20. On that record, the District Court unsurprisingly found that "[n]o genuine issue of material fact remains" that Petitioners' alleged index-manipulation practices "directly affect the jurisdic-

tional rate." *Id.* at 110a-111a. This is no indirect-effects case.

Respondents strain to explain away the record in a footnote: "The district court once used the phrase 'directly affect,' but respondents challenged that characterization on appeal as incorrect. The Ninth Circuit * * * agreed with respondents." Learjet Opp. 19-20 n.3. Every assertion in that footnote is wrong. The District Court spent pages explaining how index manipulation directly affected wholesale rates. Pet. App. 110-112 & nn. 19-20. And Respondents' claim that they "challenged" the District Court's finding is false, which is why they provide no citation. Instead—and consistent with the District Court's undisputed finding—Respondents conceded that index prices were "used to set the price in jurisdictional transactions[.]" Resp. CA9 Opening Br. 11-12.

Nor did the Ninth Circuit "agree[] with Respondents" that the effect on wholesale rates was indirect. Learjet Opp. 19 n.3. The panel did not say a word about the issue. The panel could sidestep it precisely because of the erroneous holding that the NGA does not preempt state-law claims "arising out of transactions outside of FERC's jurisdiction." Pet. App. 28a. That approach rendered irrelevant the directness of the effect on wholesale rates—the very factor that this Court has called the "crux" of the NGA-preemption issue, *Schneidewind*, 485 U.S. at 306, and that the District Court correctly deemed dispositive.

In the end, Respondents' counterfactual focus on indirect effects is a failed attempt to distract from the key point: The Ninth Circuit adopted a "transactional" preemption test. That test is irreconcilable with this Court's teaching that a state-law claim

"aimed" at a subject committed to federal control is preempted. *Kurns*, 132 S. Ct. at 1268.

2. The Wisconsin Respondents take a different tack. They admit that under the Ninth Circuit's rule, "the test is whether the sales in question are wholesale or retail." Wisconsin Opp. 19 n.20. And they try to defend that rule, to no avail.

Respondents observe that the NGA gives the federal government power to regulate wholesale sales and the states power to regulate retail sales. Wisconsin Opp. 17. They argue that the panel's decision hews to that demarcation because Respondents' state-law claims "exclusively challenge retail sales" and thus "fall on the state side of the jurisdictional line." *Id.*

That is just the Ninth Circuit's fundamental mistake, rephrased. To be sure, Respondents seek damages based on retail purchases, but their claims do not "exclusively challenge retail sales." Instead, as the Learjet Respondents admit, Respondents' claims are directed at, and seek to impose liability for, "conduct"—index manipulation and other practices—that preceded Respondents' retail sales. Learjet Opp. i. They cannot do so under this Court's precedent. The practices Respondents challenge directly affected wholesale rates, and therefore federal law is the exclusive mechanism to regulate those practices. *See Mississippi Power & Light Co.* v. *Mississippi ex. rel. Moore*, 487 U.S. 354, 377 (1988) ("[I]f FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.") (Scalia, J., concurring). Respondents' argument, like the decision below, ignores this Court's teaching that suits "directed at * * * things over which [the NGA] has comprehensive authority" fall on the federal side of the line. *Schneidewind*, 485 U.S. at 308; *Trans-*

continental Pipe Line Corp. v. *State Oil & Gas Bd.*, 474 U.S. 409, 419 (1986); *see Kurns*, 132 S. Ct. at 1268.[1]

Respondents also assert that Petitioners' approach would allow FERC to regulate retail sales and thus "would nullify the jurisdictional limits of federal power[.]" Wisconsin Opp. 32. But that just repeats the misconception discussed above. No one is saying FERC can regulate retail sales. On the contrary, the states retain their full measure of authority over those sales; for example, only states can regulate retail prices, and only states can regulate whether retail purchasers may use published indices to set retail prices. By contrast, federal regulation of index-reporting practices does not "regulate" retail sales. Instead, it ensures uniform federal regulation of a practice that directly affects jurisdictional gas rates nationwide. *See Schneidewind,* 485 U.S. at 310 (referring to "the uniformity of regulation which was an objective" of the NGA) (quotation marks omitted). The assertion that the Ninth Circuit's rule is necessary to avoid "unravel[ing] the dual regulatory system," Wisconsin Opp. 32, is baseless.

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[1] Respondents fail to distinguish *Kurns*. Learjet Opp. 21-22; Wisconsin Opp. 21 n.22. As Respondents acknowledge, *Kurns* held that the locomotive-equipment field was preempted, regardless of how the plaintiff's claim arose. That is this case: Congress occupied the field of gas-company practices that directly affect wholesale rates. That Respondents' damages *arose* from retail transactions is irrelevant; the point is that their suits are *aimed at* the preempted area. *See* 132 S. Ct. at 1268.

III. THE QUESTION PRESENTED IS OF DEEP IMPORTANCE AND REVIEW IS REQUIRED NOW.

Finally, the "prudential" reasons Respondents proffer to deny certiorari deserve no weight.

1. Respondents maintain that any decision in this case would have "no import beyond this precise litigation" because the EPAct, Pub. L. No. 109-58, 119 Stat. 594 (2005), amended the NGA to give FERC jurisdiction over the practices at issue. Learjet Opp. 7, 12-14. That claim rests on two incorrect premises. The first premise is that prior to the EPAct, FERC had no power to regulate those practices. In fact, FERC always had authority to regulate deceptive jurisdictional-gas-company practices directly affecting wholesale rates; this authority is just a subset of its power to regulate *any* jurisdictional-gas-company practices directly affecting wholesale rates. *See* 15 U.S.C. § 717d(a). That is why FERC regulated these practices in 2003, two years before the EPAct was enacted. *See* Pet. 9.

The second premise is that the EPAct somehow expanded FERC's authority in a way that neutralizes the Ninth Circuit's erroneous holding. Wrong again. The EPAct extended FERC's jurisdiction to cover "any entity"—rather than just jurisdictional companies—whose deceptive practices directly affect the jurisdictional market. 15 U.S.C. § 717c-1. But the EPAct did not change the substantive reach of FERC's authority; it remains limited to practices that directly affect wholesale rates. *See* FERC Order No. 670, *Prohibition of Energy Market Manipulation*, ¶ 16 (2006) (interpreting EPAct not to "expand the types of transactions subject to the Commission's jurisdiction"). The EPAct thus does nothing to cure the Ninth Circuit's conclusion that states share

authority with FERC to regulate practices that directly affect both wholesale and retail rates. Before and after the EPAct, the panel's holding allows every state to regulate in a field FERC is supposed to occupy alone.

Moreover, the Ninth Circuit's transaction-based approach to preemption is not limited to deceptive practices. The decision instead threatens to destroy regulatory uniformity anytime a contract or practice simultaneously affects wholesale and retail markets. Respondents are therefore wrong to assert that "[t]he opinion below has no significance for any entity other than" the parties here. Wisconsin Opp. 29.

Indeed, Respondents' assertion is completely belied by the multiple *amicus* briefs filed by associations representing all segments of the gas and power industries, from traders to pipelines to utilities. As *amici* explain, the Ninth Circuit's decision will fragment energy regulation by permitting all 50 states to impose their laws on any and all practices that affect wholesale rates, so long as retail sales are also affected.

That regulatory chaos will radiate throughout the gas and power industries, with ramifications far beyond alleged index manipulation. To take just one example, FERC regulates certain "accounting and financial reporting of its jurisdictional companies." FERC, *Accounting Matters*.[2] And yet any number of accounting practices could, under the Ninth Circuit's preemption test, subject gas companies to the whims of state-court juries asked to decide whether a practice is unfair under state law. *See* Br. of Washington

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[2] *Available at* http://www.ferc.gov/legal/acct-matts.asp.

Legal Found. 14-16. The Ninth Circuit's erroneous transaction-based test poses an ongoing, substantial threat to the interstate energy market.

2. Respondents further oppose review because the Ninth Circuit remanded the case for further proceedings. Learjet Opp. 23. But the Ninth Circuit's decision is its last word on the preemption question; remand will not change the legal issue decided by the Ninth Circuit or diminish its precedential impact. And this Court routinely reviews preemption cases in an identical procedural posture, where the lower court found no preemption at the summary-judgment stage and remanded for further proceedings. *See, e.g.*, *Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769 (2013); *Altria Group, Inc.* v. *Good*, 555 U.S. 70 (2008); *Unum Life Ins. Co.* v. *Ward*, 526 U.S. 358 (1999). There is no barrier to review. Because the Ninth Circuit's preemption analysis critically undermines "the uniformity of the federal scheme," *Transcon*, 474 U.S. at 423, immediate review—and reversal—is warranted.

CONCLUSION

The petition should be granted. In the alternative, the Court may wish to call for the views of the Solicitor General.

Respectfully submitted,

NEAL KUMAR KATYAL*
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

(202) 637-5600
neal.katyal@hoganlovells.com

*Counsel of Record
Counsel for Petitioners

November 2013

AMICUS CURIAE BRIEF

No. 13-271

In the Supreme Court of the United States

ONEOK, INC. ET AL., PETITIONERS

v.

LEARJET, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID L. MORENOFF
Acting General Counsel
ROBERT H. SOLOMON
Solicitor
HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the Natural Gas Act, 15 U.S.C. 717-717w, preempts respondents' state-law antitrust claims targeting manipulation of privately published natural gas price indices, when respondents' purchases of natural gas from petitioners were not subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under 15 U.S.C. 717(b), but the manipulation directly affected wholesale rates for natural gas sales, which FERC has exclusive authority to regulate, 15 U.S.C. 717(b), 717d(a).

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Natural Gas Act (NGA), 15 U.S.C. 717-717w, grants the Federal Energy Regulatory Commission (Commission or FERC) authority to regulate defined segments of the natural gas market. Section 717(b) provides FERC with jurisdiction over "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale," and "natural-gas companies engaged in such transportation or sale." The NGA does not apply "to any other transportation or sale of natural gas," "to the local distribution of natural gas," "to the facilities

used for such distribution[,] or to the production or gathering of natural gas." 15 U.S.C. 717(b). Those areas are generally left open to state regulation. See *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

In exercising its authority under the NGA, FERC acts to ensure that "any rate * * * charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission," is just, reasonable, and not unduly discriminatory or preferential. 15 U.S.C. 717d(a), 717c. FERC has the same authority with respect to "any rule, regulation, practice, or contract affecting such rate." 15 U.S.C. 717d(a).

In 1978 and 1989, Congress "substantially narrowed" FERC's jurisdiction by removing "first sales" of natural gas from FERC's rate-setting jurisdiction. See 68 Fed. Reg. 66,323, 66,325 (Nov. 26, 2003) (citing Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432, and Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157). "First sales" are "sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007) (*Gallo*); see 15 U.S.C. 3301(21) (defining first sales). Accordingly, "sales by pipelines, local distribution companies, and their affiliates [are not] first sales unless these entities are selling gas of their own production." *Gallo*, 503 F.3d at 1037.

FERC's rate-setting jurisdiction thus "includes all sales for resale by interstate and intrastate pipelines and [local distribution companies] and their affiliates, other than their sales of their own production."

National Ass'n of Gas Consumers v. *All Sellers of Natural Gas*, 106 F.E.R.C. ¶ 61,072, at 61,247, 61,248 (2004). This Court has held that, by removing first sales from FERC's jurisdiction, Congress intended to leave the field unregulated by both FERC and the States. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422-423 (1986).

Since 1992, FERC has issued blanket marketing certificates that authorize natural gas companies to make wholesale sales at market-based rates, rather than at rates pre-filed with FERC, upon a finding that the company lacks market power. See 57 Fed. Reg. 13,267, 13,270 (Apr. 16, 1992); *id.* at 57,952, 57,957-57,958 (Dec. 8, 1992). During the time period at issue here (2000-2002), FERC's oversight of the market primarily consisted of this before-the-fact examination of market power, and the availability of a complaint process under 15 U.S.C. 717d(a).

b. This case concerns well-documented misconduct in the natural gas market, involving false price reporting to privately published price indices and "wash trades" (*i.e.*, prearranged offsetting sales of the same product between two parties used to create a false price for use in the indices) in the years 2000 and 2001, a period corresponding to the Western energy crisis of 2000-2002. Pet. App. 13a-14a; see 68 Fed. Reg. at 66,328, 66,329 (describing wash trades). Buyers and sellers in the natural gas markets use those price indices, which are intended to represent average natural gas prices at different times and places, as reference points for pricing all types of natural gas transactions, including wholesale transactions within FERC's jurisdiction, and non-jurisdictional transac-

tions (*i.e.*, retail sales and first sales). See Pet. App. 14a, 110a-112a.

In 2003, FERC completed an investigation of manipulation in the natural gas and electric markets during that 2000-2002 time period. See *Final Report on Price Manipulation in Western Markets*, Docket No. PA02-2-000 (F.E.R.C. Mar. 2003), http://www.ferc.gov/industries/electric/indus-act/wec.asp (*Final Report*). The report identified five major traders, each a petitioner here, as having "admitted that their employees falsified information provided to" the index publishers. *Id.* at ES-6. FERC determined that, as a result of those and other practices, "[s]pot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market." *Id.* at ES-1. The report explained that "the Commission has jurisdiction over most of the transactions that form the basis for the indices and many Commission jurisdictional transactions (both gas and electric) are based on the indices." *Id.* at III-17. The report recommended various reforms to FERC rules to "[en]sure that the published indices are accurate, not subject to manipulation, and not serving as a means for price manipulation." *Ibid.*; see *id.* at III-51 (recommendations).

After issuing the report, FERC amended all blanket marketing certificates explicitly to prohibit "engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." 68 Fed. Reg. at 66,324. Those amendments, referred to as the 2003 Code of Conduct, also require that jurisdictional sellers (*i.e.*, natural gas companies engaged in the sale of natural gas in interstate commerce for

resale, 15 U.S.C. 717(b)) that choose to report to price indices must "provide accurate and factual information[,] and not knowingly submit false or misleading information or omit material information to any such publisher." 68 Fed. Reg. at 66,331; see 18 C.F.R. 284.288(a). FERC explained that the original blanket certificates "implicitly prohibited acts which would manipulate the competitive market for natural gas," but that the Western energy crisis made clear the need "to explicitly prohibit acts intended to manipulate the natural gas market." *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. ¶ 61,174, at 61,688, 61,690 (May 19, 2004) (denying rehearing of the 2003 Code of Conduct). FERC also issued a policy statement setting forth standards intended to ensure a robust and accurate voluntary price reporting regime. See *Policy Statement on Natural Gas and Electric Price Indices*, 104 F.E.R.C. ¶ 61,121, at 61,403 (2003), clarified, 112 F.E.R.C. ¶ 61,040, at 61,294 (2005); see *id.* at 61,404 (discussing generally wide use of price indices in natural gas and electric markets).

c. In the Energy Policy Act of 2005 (EPAct), Pub. L. No. 109-58, 119 Stat. 594, Congress expressly prohibited market manipulation and reporting of false price information. The EPAct also expanded FERC's enforcement authority to reach not only jurisdictional sellers, but "any entity" that, "directly or indirectly, * * * use[s] or employ[s], in connection with the purchase or sale of natural gas * * * subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance * * * in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. 717c-1.

In regulations implementing the EPAct, FERC explained that it was not expanding "the types of transactions subject to the Commission's jurisdiction" under the NGA. 71 Fed. Reg. 4244, 4247 (Jan. 26, 2006). FERC explained, however, that under the EPAct, "[i]f any entity engages in manipulation and the conduct is found to be 'in connection with' a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority." *Id.* at 4247-4248. FERC stated that it "views the 'in connection with' element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction." *Id.* at 4249.

2. Petitioners are natural gas traders that engage in FERC-jurisdictional wholesale sales, as well as non-jurisdictional retail and first sales of natural gas. Pet. App. 12a, 81a-102a. Respondents are industrial and commercial natural gas users. *Id.* at 12a. Beginning in 2005, respondents brought state antitrust claims in state and federal court seeking to recover damages arising from petitioners' alleged manipulation of the natural gas market between 2000 and 2002. *Id.* at 12a-14a, 19a-21a, 67a-68a. The cases were consolidated in a multidistrict litigation proceeding. *Id.* at 12a. Respondents contend that petitioners conspired to give false price information to the indices and engaged in wash trades, which artificially increased the price of natural gas in their non-jurisdictional transactions with petitioners, *i.e.*, retail sales and first sales. *Id.* at 12a-13a. In 2007, petitioners moved for summary judgment on the ground that respondents' state-law antitrust claims were preempted by the NGA. *Id.* at 22a.

3. a. The district court initially denied petitioners' motion for summary judgment. 2:03-cv-01431 Docket entry No. 1025 (May 14, 2008). The court explained that, under Section 717(b), Congress gave FERC jurisdiction over "matters relating to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales." *Id.* at 6. The court concluded, however, that FERC's jurisdiction over *entities* engaged in jurisdictional sales "does not mean FERC has exclusive jurisdiction over those companies' conduct in non-jurisdictional transactions," *i.e.*, petitioners' alleged manipulation of the natural gas market to increase the price of natural gas at retail or first sale, which "falls outside FERC's exclusive jurisdiction." *Id.* at 8, 16-17.

b. The district court later granted petitioners' motion for reconsideration. Pet. App. 124a-136a. Petitioners argued that it is not only their status as jurisdictional sellers that gives FERC exclusive jurisdiction over their alleged conduct, but FERC's authority under Section 717d(a) "to regulate any practice by a jurisdictional seller that affects a jurisdictional rate." *Id.* at 132a.

The district court recognized that FERC has jurisdiction under Section 717d(a) "to regulate any practice by a jurisdictional seller affecting a rate charged or collected * * * in connection with the transportation or sale of natural gas within FERC's jurisdiction." Pet. App. 133a. The court therefore ruled that "if [petitioners] were jurisdictional sellers and their alleged practices of false price reporting and wash trades were practices which directly affected a juris-

dictional rate, the practices fell within FERC's exclusive jurisdiction," and respondents claims would be preempted. *Id.* at 135a.

c. After further submissions, the district court granted petitioners' motion for summary judgment. Pet. App. 64a-123a. The court concluded that petitioners are jurisdictional sellers, *id.* at 77a; *id.* at 81a-102a, and that their alleged false price reporting and wash trades by petitioners directly affected jurisdictional rates because wholesale rates are also set by reference to the indices that petitioners had manipulated. *Id.* at 72a, 110a-112a.

4. a. The court of appeals reversed in relevant part. Pet. App. 1a-63a. The court concluded that Section 717d(a), although it provides FERC with jurisdiction over practices affecting wholesale rates, does not preempt state antitrust claims that "aris[e] out of price manipulation associated with transactions falling outside of FERC's jurisdiction." *Id.* at 24a. The court reasoned that preemption of respondents' state antitrust claims would "conflict[] with Congress's express intent to delineate carefully the scope of federal jurisdiction" set forth in Section 717(b). *Ibid.*; *id.* at 32a-33a. The court concluded that FERC's authority under Section 717d(a) should be read narrowly "to define the scope of FERC's jurisdiction within the limitations imposed by Section [717(b)]." *Id.* at 29a.

b. The court of appeals found support for its holding in its previous decision in *Gallo*. Pet. App. 25a-28a. In *Gallo*, the plaintiff brought federal and state antitrust claims against a natural gas supplier, alleging that it had paid inflated prices in retail purchases due to the supplier's manipulative price reporting and

wash trades that affected the price of natural gas reflected in the indices. 503 F.3d at 1030-1032. The defendant moved for summary judgment on the ground that the filed-rate doctrine and federal preemption barred the claims. *Id.* at 1030. Under the filed-rate doctrine, state and federal antitrust laws may not be used to invalidate a rate that is set or authorized by FERC. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981).

The court of appeals concluded in *Gallo* that, under the filed-rate doctrine, "the market-based rate for natural gas transactions under FERC's jurisdiction are FERC-authorized rates, and cannot be the basis of a federal antitrust or state damage action." 503 F.3d at 1043. The court further concluded, however, that the indices were not equivalent to FERC-authorized rates because they were composed, in part, of fictitious rates and rates from non-jurisdictional sales. *Id.* at 1045. The court held that, "to the extent the indices are comprised of rates that are not FERC-authorized rates, the [filed-rate doctrine] does not bar [plaintiff's] claim that such rates are unfair and led to unfair retail rates," but that plaintiff "cannot challenge FERC-authorized rates that are incorporated in the indices." *Id.* at 1048. The court also held in *Gallo* that Congress's decision to remove first sales from FERC's jurisdiction meant that a plaintiff may "base[] damage claims" on manipulative reporting of first-sale transactions because, in its view, antitrust law "complement[s]" Congress's goal of deregulating first sales. *Id.* at 1046.

The court of appeals concluded in the decision below that the reasoning of *Gallo* "applies with equal force to the question presented in this case." Pet.

App. 28a. The court therefore concluded that "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction." *Ibid.*

c. The court of appeals rejected petitioners' argument that FERC's promulgation of the 2003 Code of Conduct confirmed that FERC had jurisdiction over the price manipulation at issue here. Pet. App. 36a-39a. The court noted that in 2005, Congress enacted the EPAct, which prohibits market manipulation and authorizes FERC to promulgate regulations to protect natural gas purchasers. *Id.* at 37a. The court believed that the EPAct would have been unnecessary if FERC already had regulatory authority over such manipulative conduct. *Id.* at 37a-38a. The court also noted that FERC limited the application of the 2003 Code of Conduct to sales within its jurisdiction, which in the court's view showed that FERC did not have jurisdiction over manipulative behavior related to non-jurisdictional sales. *Id.* at 38a.

DISCUSSION

Under 15 U.S.C. 717d(a), FERC has exclusive authority over practices affecting rates charged by natural gas companies in connection with the interstate sale of natural gas for resale. Because the manipulation of price indices that are used to establish rates in both jurisdictional and non-jurisdictional natural gas transactions is a practice that directly affects jurisdictional rates, the court of appeals erred in concluding that FERC did not have exclusive authority in 2000 and 2001 to regulate petitioners' manipulation of the indices.

Although the court of appeals reached an incorrect conclusion about the scope of FERC's authority under

Section 717d(a), this Court's review is not warranted. Contrary to petitioners' contention, the court of appeals' decision does not conflict with any state supreme court decision. Furthermore, significant changes to the regulatory environment make it highly unlikely that the factual scenario giving rise to respondents' claims will recur, and FERC's expanded authority under the EPAct would presumably alter the preemption analysis going forward, making any decision by this Court on the scope of FERC's authority to regulate manipulation of the indices under Section 717d(a) of limited prospective significance.

A. FERC Had Exclusive Jurisdiction Over Petitioners' Manipulation Of The Privately Published Price Indices In 2000 And 2001

1. a. Where, as here, Congress has not expressly preempted state law, preemption will nevertheless occur if state law conflicts with federal law or "the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively." *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-1266 (2012) (brackets in original; citation omitted). By enacting the NGA, "Congress occupied the field of matters relating to wholesale sales * * * of natural gas in interstate commerce." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988).

As the court of appeals explained (Pet. App. 24-25), 15 U.S.C. 717(b) provides that the NGA applies to the sale of natural gas in interstate commerce for resale and to companies engaged in such sale, but the Act does not apply to "any other * * * sale of natural gas." *Ibid.* Although FERC thus does not have jurisdiction to regulate "the entire natural gas field," Congress "contemplated the exercise of federal power as

specified in the Act," *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989), and the Act provides FERC with authority to ensure that any "rule, regulation, practice, or contract affecting" rates charged by natural gas companies in connection with jurisdictional transactions is just, reasonable, and not unduly discriminatory, 15 U.S.C. 717d(a), 717c. As a result, the NGA "leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (citation omitted).[1]

b. This case presents a unique scenario: in the natural gas market, both wholesale and retail natural gas rates were set with reference to the same privately published price indices. Pet. App. 110a-112a. Petitioners provided evidence that jurisdictional contracts included price terms set at index, *id.* at 111a n.19, and FERC's final report on the Western energy crisis concluded that "the Commission has jurisdiction over most of the transactions that form the basis for the indices and many Commission-jurisdictional transactions * * * are based on the indices." *Final Report* III-17.

Because manipulation of the indices thus directly affected the wholesale price of natural gas, the conduct that respondents challenge was a "practice * * * affecting" the rates charged by natural gas

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[1] This Court has observed with respect to a parallel provision of the Federal Power Act, 16 U.S.C. 791a *et seq.*, that "[t]he rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context." *FPC* v. *Conway Corp.*, 426 U.S. 271, 281 (1976).

companies in jurisdictional sales within the meaning of 15 U.S.C. 717d(a). The practice therefore was subject to FERC's exclusive authority under Section 717d(a) to determine whether practices affecting jurisdictional rates are just, reasonable, and not unduly discriminatory.

In conducting preemption analysis under Section 717d(a), this Court has looked to the effect of a state law, not its nominal subject, to determine whether the NGA has preemptive force. In *Schneidewind*, for example, Michigan sought to regulate the issuance of long-term securities by natural gas companies transporting gas into the State. 485 U.S. at 296-297. The Court concluded that, although the NGA does not "expressly authorize[] [FERC] to regulate the issuance of securities by natural gas companies," the State was prohibited from doing so. *Id.* at 304.

The Court explained that when FERC determines a reasonable rate of return on invested capital for a natural gas company, if the company's equity ratio moves beyond generally accepted limits, FERC may calculate a company's rates based on an imputed capital structure, rather than its actual capital structure, "to limit the burden on ratepayers of abnormally high equity ratios." *Schneidewind*, 485 U.S. at 302. Because the state law would permit the State to keep a natural gas company from raising its equity levels above a certain point, thus "ensur[ing] that the company w[ould] charge only what Michigan consider[ed] to be a 'reasonable rate,'" the Court concluded that the state law was preempted. *Id.* at 308. Relying in part on FERC's authority under Section 717d(a) to regulate practices affecting wholesale rates, *id.* at 309, the Court explained that FERC essentially reviewed a

company's capital structure when determining a reasonable rate for the company, and the state law "[wa]s directed at * * * precisely the things over which FERC has comprehensive authority." *Id.* at 308.

Moreover, in the parallel context of the regulation of wholesale electric power under the Federal Power Act, the D.C. Circuit has held that FERC has authority to review rules related to power capacity pursuant to its authority under 16 U.S.C. 824e(a) to ensure that "practices * * * affecting" rates subject to FERC's jurisdiction are just and reasonable, even though the rules affected state decisions about generation facilities, which FERC cannot directly regulate by virtue of 16 U.S.C. 824(b)(1). See *Connecticut Dep't of Pub. Util. Control* v. *FERC*, 569 F.3d 477, 479 (2009), cert. denied, 558 U.S. 1110 (2010). Capacity-related requirements are far more removed from jurisdictional rates than the indices at issue here, which are expressly referenced in jurisdictional transactions.

2. a. The court of appeals concluded (Pet. App. 28a-36a) that FERC's authority under Section 717d(a) must be read narrowly because Section 717(b) excludes retail sales of natural gas from FERC's regulatory authority. The cases cited by the court of appeals, however, establish only that the practice regulated by FERC under Section 717d(a) must have a direct effect, not an incidental effect, on jurisdictional gas rates.

In *Northwest Central Pipeline Corp.*, the Court considered a state law that governed the timing and production of natural gas from the Kansas-Hugoton field, which the plaintiffs contended was preempted by the NGA because it would exert pressure on pipelines to increase purchases from Hugoton producers and

thereby "affect[] their purchase mixes and cost structures." 489 U.S. at 497. The Court noted that Section 717(b) explicitly states that the NGA does not apply to the "production or gathering of natural gas," and it concluded that the state law fell within that category as a regulation of the timing of production of natural gas within the State. *Id.* at 511-512. The Court acknowledged that the state law "may result in pipelines making purchasing decisions that have an effect on their cost structures and hence on interstate rates," but it concluded that the possibility that enforcement "might have some effect on interstate rates" did not support a finding of preemption. *Id.* at 512-513.

In *American Gas Ass'n* v. *FERC*, 912 F.2d 1496 (1990), cert. denied, 498 U.S. 1084 (1991), the D.C. Circuit considered whether FERC had jurisdiction to review the justness and reasonableness of contracts governing non-jurisdictional sales on the ground that those contracts might affect jurisdictional rates. *Id.* at 1504. FERC had asserted in that case that its Section 717d(a) authority with respect to contracts affecting jurisdictional rates did not extend to non-jurisdictional contracts, but more importantly, the non-jurisdictional contracts that FERC had declined to review "'affect[ed]' [jurisdictional] rate[s] indirectly, merely by affecting the costs that determine what pipeline sales rates are * * * 'just and reasonable.'" *Id.* at 1506. The court concluded that contracts affecting the wholesale rate in such an indirect way "are beyond [Section 717d]'s reach." *Ibid.*

Unlike the practices at issue in the above cases, the manipulation of the indices here was "not insignificant or tangential to jurisdictional rates." Pet. App. 111a; see Learjet Br. in Opp. 8-9 (contending that manipula-

tion of the indices had only an "attenuated" effect on wholesale rates). As the district court explained, the indices were "the method by which jurisdictional rates are set and embody jurisdictional rates." Pet. App. 111a-112a; *Final Report* III-17. This case thus presents a unique situation in which privately published indices were used by the natural gas industry to set prices in both jurisdictional and non-jurisdictional sales of natural gas. In those circumstances, FERC's authority under Section 717d(a) to ensure that practices affecting jurisdictional rates are just, reasonable, and not unduly discriminatory granted FERC exclusive jurisdiction to regulate the manipulation of the indices.[2]

b. The court of appeals erred in relying on its decision in *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007), to hold that the NGA does not preempt "state law claims arising out of transactions outside of FERC's jurisdiction." Pet. App. 28a. Even assuming *arguendo* that *Gallo* was correctly decided, it did not control this case. The court in *Gallo* was primarily considering whether antitrust claims were precluded based on the filed-rate doctrine, which is why the court was concerned with whether the prices reported to the indices were from

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[2] The court of appeals erred to the extent it suggested that the manipulative behavior at issue here is not a "practice" affecting wholesale rates. See Pet. App. 32a-34a (citing *California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395 (D.C. Cir. 2004)). There is no question that FERC has had authority since 2005 to regulate market manipulation pursuant to the EPAct. See 15 U.S.C. 717c-1. But even before 2005, FERC was of the view that market manipulation was a "practice[]" that is unjust and unreasonable. *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. ¶ 61,174, at 61,690.

FERC-jurisdictional transactions, or were instead fictitious prices or prices reported for non-jurisdictional sales. 503 F.3d at 1045-1048. In this case, the question is whether manipulation of the indices during the relevant period was a practice affecting wholesale rates. Because the wholesale price of natural gas was pegged to the indices, Pet. App. 110a-112a, manipulation of the indices necessarily affected jurisdictional rates regardless of the underlying nature of the transactions included therein. Respondents' argument that their state-law claims are not preempted is based on the non-jurisdictional nature of their *transactions* with petitioners, not the manipulation of non-jurisdictional sales information reported to the indices. Learjet Br. in Opp. 4, 6; Wisc. Br. in Opp. 7-8, 19 n.20.

c. FERC's jurisdiction over the manipulation of the indices to the exclusion of the States does not mean that federal antitrust laws would be displaced to the extent they apply. See, *e.g.*, *Connell Constr. Co.* v. *Plumbers Local Union No. 100*, 421 U.S. 616, 635-637 (1975). Regulation under the NGA does not insulate companies from federal antitrust laws. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973) (stating that "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws" by enacting the NGA). This Court has held that in the relationship between the NGA and federal antitrust laws, "the rule is to give effect to both if possible." *California* v. *FPC*, 369 U.S. 482, 485 (1962) (citation omitted). Unlike federal antitrust laws, application of state antitrust laws would "impos[e] on interstate natural gas wholesalers 50 different sets of state rules

concerning anticompetitive behavior." *State* v. *Reliant Energy, Inc.*, 289 P.3d 1186, 1193 (Nev. 2012), cert. denied, 133 S. Ct. 2853 (2013) (*Reliant*); see *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010).[3]

B. The Court Of Appeals' Decision Does Not Conflict With Any State Supreme Court Decision

Petitioners contend (Pet. 12-16) that the court of appeals' decision conflicts with the Supreme Court of Tennessee's decision in *Leggett*, *supra*, and the Supreme Court of Nevada's decision in *Reliant*, *supra*. Petitioners' contention rests on a misunderstanding of those decisions, and there is no conflict that would warrant this Court's resolution.

1. In *Leggett*, the plaintiffs were commercial and residential consumers that had purchased natural gas from utilities at retail. 308 S.W.3d at 847. The utilities had previously "acquired the product wholesale from the defendants." *Id.* at 847-848. The plaintiffs alleged that the wholesalers had made false statements about natural gas transactions and engaged in wash trades as part of a scheme "to inflate the price of wholesale natural gas," and the utilities that pur-

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[3] The Seventh Circuit held in *Illinois* v. *Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), cert. denied, 502 U.S. 1094 (1992), that application of a state antitrust law to pipeline transportation was not preempted by the NGA. Noting that the pipeline's arguments would apply equally to federal antitrust laws, and that the federal laws were not displaced, the court saw no reason to preempt a state law that "only mirrors" the federal laws. *Id.* at 1479. There is no indication that the pipeline raised a field preemption argument, which would have required distinguishing between the standards for preemption of a state law and implied repeal of another federal law.

chased gas at wholesale from the defendants then passed the inflated costs along to their retail customers. *Id.* at 848-849. The plaintiffs argued that their state-law antitrust claims were not preempted by the NGA because preemption applies only to wholesale transactions, whereas the plaintiffs "were retail-level customers." *Id.* at 850; *id.* at 865 (plaintiffs contended that "their claims are not pre-empted because they arise, at least in part, out of transactions that are not within FERC jurisdiction").

The Supreme Court of Tennessee stated that it "simply disagreed" with the plaintiffs' contention that their status as retail customers meant that their state antitrust claims were not preempted. *Leggett*, 308 S.W.3d at 872. The court explained that plaintiffs' claims were brought pursuant to the "indirect purchaser" doctrine recognized under Tennessee law. *Id.* at 852. Under that doctrine, "when a wholesaler violates [state antitrust law] and the cost of that violation is passed through a retailer to a customer, th[e] customer can seek to recover from the wholesaler, despite the fact that the two parties never directly conducted business with each other." *Ibid.* The court concluded that "[a]s indirect purchasers, [plaintiffs] are ultimately challenging wholesale prices," and their claims therefore "necessarily intrude upon the federal domain." *Id.* at 872.

2. In *Reliant*, the State of Nevada sued a natural gas wholesaler, alleging that the wholesaler (Reliant) had "conspired with the now-defunct Enron Corporation to drive up the price of natural gas." 289 P.3d at 1187. The State sued in its proprietary capacity "as a direct or indirect purchaser of natural gas * * * and also in its capacity as parens patriae on behalf of the

residents of the [relevant] areas * * * who are direct or indirect purchasers of delivered natural gas." *Id.* at 1188 n.2. The court described the case as one, like *Leggett*, see *id.* at 1192, involving "interstate natural gas wholesalers," *id.* at 1193, noting that FERC had concluded in its 2003 Final Report that "Reliant's sales were subject to its jurisdiction," *id.* at 1188. The court therefore concluded that the State's antitrust claim "improperly encroache[d] upon the [federal regulatory] field." *Id.* at 1193.

Reliant (a petitioner here) confirmed in its brief in opposition to the State's petition for a writ of certiorari in *Reliant* that the State was challenging manipulative conduct only with respect to wholesale transactions. Reliant stated that "[a]ll of the alleged misconduct occurred in FERC-jurisdictional sales between Reliant and Enron for later resale," and "[n]one of the allegedly unlawful practices occurred in the course of 'first sales' or any other sales outside of FERC's jurisdiction." Br. in Opp. at 5, *Nevada* v. *Reliant Energy, Inc.*, 133 S. Ct. 2853 (2013). Reliant, moreover, specifically stated that it would have likewise prevailed in that case under the Ninth Circuit's approach "because [the State] allege[d] state-law antitrust violations solely with respect to wholesale transactions over which FERC has exclusive jurisdiction." *Id.* at 14.

3. Because the Tennessee and Nevada courts analyzed state-law challenges to manipulation of the natural gas market by jurisdictional sellers to increase the wholesale price of natural gas in transactions that fall squarely within FERC's jurisdiction under Section 717(b), those courts had no occasion to address the specific question presented in this case—the scope of

FERC's jurisdiction to regulate practices *affecting* wholesale rates under Section 717d(a).

C. The Question Presented Lacks Prospective Importance Because The Regulatory Environment Has Changed

Further review in this case is also unwarranted because the question presented is of limited prospective importance due to significant changes in the regulatory environment in the wake of the Western energy crisis.

1. This case arose from highly unusual factual circumstances that existed in 2000 and 2001. The Western energy crisis was "an unprecedented situation in which numerous adverse events occurred simultaneously to place California and the entire West in an electricity crisis that had never before been experienced." *CAlifornians for Renewable Energy* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, at 61,243, 61,247 (2007). In addition to flawed market rules and market manipulation, there was "inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; [and] an increase in unplanned outages of extremely old generating facilities." *Ibid.*; see *Morgan Stanley Capital Gr. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 539-541 (2008) (describing the Western energy crisis and, in part, FERC's response).

In the aftermath of widespread manipulation of the market by petitioners and others during that time period, the market is far more heavily regulated. The blanket marketing certificates issued by FERC ex-

plicitly prohibit "engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." See 68 Fed. Reg. at 66,324. The certificates also require jurisdictional sellers that voluntarily report to price indices to "provide accurate and factual information[,] and not knowingly submit false or misleading information or omit material information to any such publisher." *Id.* at 66,331; see 18 C.F.R. 284.288(a).

Furthermore, in 2005, Congress enacted the EPAct, which expressly prohibits the type of manipulation that occurred in 2000 and 2001. Section 717c-1 provides that it is "unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas * * * subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance * * * in contravention of such rules and regulations as the Commission may prescribe." See pp. 23-24, *infra*. And Congress drastically increased the available penalties for companies that engage in manipulative conduct. Section 717t-1 authorizes a civil penalty of $1 million per day for any violation of the NGA or any FERC rule.

In light of this altered statutory and regulatory framework, FERC continues to encourage, with significant success, the negotiated resolution of outstanding energy crisis claims before the Commission and the courts. See *Final Report* III-2; FERC, *The Commission's Response to the California Electricity Crisis and Timeline for Distribution of Refunds* 3 (Dec. 27, 2005) (noting FERC staff had, at the time of the report, secured settlements totaling over $6.3 billion), http://ferc.gov/legal/staff-reports/comm-

response.pdf. Settlement efforts continue today, more than a decade after the energy crisis ended. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 145 F.E.R.C. ¶ 61,015, at 61,058 (2013) (approving $750 million settlement between Powerex and California parties). Because of these significant changes to the regulatory environment since 2002, the circumstances giving rise to respondents' state-law antitrust claims are unlikely to recur.

2. Furthermore, in light of the enactment of the EPAct, it may be unnecessary in future cases to evaluate whether manipulation of price indices that are used to set rates in both jurisdictional and non-jurisdictional transactions is a practice affecting wholesale rates under Section 717d(a). Section 717c-1 explicitly gives FERC authority to regulate that practice and expands the authority to "any entity" that, "directly or indirectly," uses a manipulative device in violation of FERC rules "in connection with the purchase or sale of natural gas * * * subject to the jurisdiction of the Commission." That new authority, and FERC's interpretation of its new authority to "encompass[] situations in which there is a nexus between the fraudulent conduct of an[y] entity and a jurisdictional transaction," 71 Fed. Reg. at 4247, 4249; see p. 6, *supra*, has not yet been considered by the lower courts. Preemption analysis of state-law antitrust claims related to market manipulation in future cases would presumably begin with FERC's explicit authority to regulate that practice under Section 717c-1, thus rendering any decision of this Court concerning the scope of FERC's authority to regulate the practice under Section 717d(a) of limited prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General

DAVID L. MORENOFF
Acting General Counsel
ROBERT H. SOLOMON
Solicitor
HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission

MAY 2014

AMICUS CURIAE BRIEF

No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., *et al.*,
Petitioners,

v.

LEARJET, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONERS

KEVIN B. BELFORD
MICHAEL L. MURRAY
Counsel of Record
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW
Suite 450
Washington, DC 20001
(202) 824-7070
mmurray@aga.org

Counsel for Amicus Curiae

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

The American Gas Association ("AGA") is the national trade association representing energy members that deliver natural gas. The AGA represents over 200 distribution companies, located in all 50 states that deliver natural gas to 64 million customers throughout the United States; sixty-four million customer homes and businesses in need of stable, efficient and reliable markets.

AGA members include: (1) publicly traded energy utilities, municipally owned energy utilities, and privately held utility companies and (2) natural gas distributors, pipelines, marketers and storage facilities. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for members including the filing of *amici* briefs commenting on issues that could affect its members and/or their customers.

The AGA represents businesses and other entities that participate in the intrastate and national interstate natural gas markets. For this reason, *amicus* has a substantial interest in ensuring that there is clarity and a bright line between the intra and interstate regulation of natural gas sales. As explained below, we believe these principles were violated in the subject cases.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its non-party members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

As discussed below, the rule adopted by the Ninth Circuit exposes natural gas companies to inconsistent state regulation, and uncertainty as to which state laws and jurisdictions they must comply with, for engaging in practices that for the past half-century have been subject to consistent, uniform national policy and regulation. Currently natural gas companies look to one entity—the Federal Energy Regulatory Commission ("FERC")—for certainty in these areas.

Natural gas companies participating in the complex interstate marketplace cannot implement nationwide practices with uncertainty as to the laws with which they must comply or the jurisdictions to which they may be subject. That is a recipe for confusion and will only serve as a drag on the interstate market for natural gas which will, in turn, harm consumers and the national economy.

ARGUMENT

I. HISTORY AND IMPORTANCE OF THE NATURAL GAS FEDERAL REGUATORY SCHEME

A. The Federal Government Comprehensively Regulates The Interstate Natural Gas Market To Ensure Efficiency And Uniformity.

Over the last century, the natural gas industry has progressed from local markets lightly regulated at the state level, to a national market closely controlled by the federal government, and, ultimately, to our present system which incorporates competitive market principles into a well-established and uniform

regulatory scheme addressing natural gas in interstate commerce.

During the 1800's, natural gas was used mainly to power street and housing lights in the United States. Today, almost 200 years later, natural gas is one of the principal energy sources in the United States, integral to the needs of individual consumers, business and industry, local and state governments, and the federal government.

Today, the Energy Information Administration, US Department of Energy, reports that U.S. natural gas reserves are at record levels (over 330 tcf at year-end 2011) and have grown with the continued development of shale gas during the past seven years.[2, 3] In 1990, that inventory represented about 9 years of domestic dry gas production. Today, the 334 tcf of proven dry gas reserves represents nearly 14 years of an on-the-shelf inventory supported by over 100 years of resources and reserves combined—assuming continued U.S. natural gas production of levels.

The abundance of natural gas means that it will play an ever increasing role in meeting the constantly expanding energy needs of the United States. It is hard to understate the importance of natural gas to the future of the United States. Thus, ensuring reliable and consistent laws, regulation and policy is

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[2] Energy Informational Administration, Natural Gas Reserves Summary as of December 31, 2011. http://www.eia.gov/dnav/ng/ng_enr_sum_a_EPG0_R11_BCF_a.htm. Source: Form EIA-23, "Annual Survey of Domestic Oil and Gas Re-serves."

[3] Natural gas *reserves* are the on-the-shelf inventory associated with drilled wells and thus most immediately available for production.

vital to both the public and private interests of the United States and its citizens.

Initially, the distribution of natural gas was regulated by local municipalities. By the early 1900's, the first intrastate pipelines were developed and transportation of natural gas between municipalities began to occur. In 1907, New York and Wisconsin were the first states to form public utility and service commissions to oversee the regulation of natural gas distribution. Over the ensuing years, other states followed suit. Soon enough, however, technological advances permitted interstate pipelines to be developed, and the interstate distribution of natural gas began. As with their predecessors, the local municipalities, state governments could only regulate the distribution of pipelines within their individual jurisdictions; they could not regulate the new interstate pipelines.

In 1938, Congress passed the Natural Gas Act ("NGA") and charged the federal government with regulating the prices charged by the companies that owned and operated the interstate natural gas pipelines. The NGA gave the Federal Power Commission jurisdiction over regulation of interstate natural gas sales.

However, natural gas producers were not regulated under the Natural Gas Act. In 1954, however, the Supreme Court held that natural gas producers that sold gas into interstate pipelines fell under the classification of "natural gas companies" under the Natural Gas Act and were subject to federal regulation. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). From 1954 through the early 1970's, the federal government utilized different schemes to regulate the price of natural gas. But,

these regulatory attempts backfired since they blunted incentives to produce natural gas. In fact, during 1976 and 1977, severe natural gas shortages led to closures of industries and schools in the Midwest while states in the southern producing regions of the country experienced no shortages.

To remedy the strains created by the shortages, Congress enacted new legislation, the Natural Gas Policy Act of 1978, 15 U.S.C. 717 et. seq. ("NGPA"). Congress had three main goals in implementing the Natural Gas Policy Act of 1978, specifically (1) creating a single, national natural gas market; (2) equalizing supply with demand; and (3) allowing market forces to establish the wellhead price of natural gas. To meet these goals, Congress created the FERC. Under the NGPA, the FERC was authorized to approve the transportation of natural gas by an interstate pipeline on behalf of intrastate pipelines and local distribution companies—avoiding some of the regulatory hurdles that had created such a schism between interstate and intrastate markets, which was one of the primary reasons for the severe gas shortages.

Using its authority under the NGPA, the FERC began the process of introducing competition to the natural gas market. Historically, pipeline operators purchased natural gas from producers, transported it to their customers (mostly local distribution companies or "LDCs")[4], and sold the bundled product of gas and the transportation service for a single, regulated price. This meant that a pipeline customer

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[4] An LDC, or local distribution company, is the entity that provides natural gas to end users, such as consumers, business, industry, and government.

could not purchase natural gas from a producer as one product and transportation service as a separate service from a pipeline company. This limitation impeded Congress' goal of creating a single, national, natural gas market.

In 1985, the FERC issued Order No. 436, which permitted pipelines to offer transportation service as a separate service.[5] Essentially, with Order No. 436, the FERC allowed pipelines, on a voluntary basis, to offer transportation services to customers who requested them on a first come, first served basis. At the same time, the FERC barred interstate pipelines from discriminating against such customer transportation requests in favor of protecting their own merchant services (i.e. the bundled product of gas and transportation service). One of the long term effects of Order No. 436 was that the transportation function became the primary function of the interstate pipelines and the practice of bundled gas and transportation services declined.

In furtherance of this regulatory scheme based on competitive market principles, Congress passed the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157, deregulating 'first sales' and

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[5] *Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (1985), *vacated and remanded, Associated Gas Distrib. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *readopted*, Order No. 500, FERC Stats. & Regs., Regs. Preambles ¶ 30,761 (1987), *remanded, American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, FERC Stats. & Regs., Regs. Preambles ¶ 30,867 (1989), *order on reh'g*, Order No. 500-I, FERC Stats. & Regs., Regs. Preambles ¶ 30,880 (1990), *aff'd in relevant part, American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 957 (1991).

removing them from FERC's rate setting jurisdiction. By this Act, Congress did not relinquish its regulatory authority but continued its policy of replacing direct regulation with a reliance on competitive market forces.

The Congressional and FERC efforts were successful and a single, national, natural gas market emerged, shortages disappeared, and market forces determined the price of natural gas. In 1992, the FERC issued Order No. 636, which completed the final steps toward the permanent unbundling of pipeline services.[6] (Order No. 636 is sometimes called the "Final Restructuring Rule"). Essentially, Order No. 636 requires that pipelines separate their transportation and sales services so that all pipeline customers may purchase gas from any producer and may purchase transportation services from any pipeline according to rates filed with the FERC in the form of a tariff. Order No. 636 also required that pipelines restructure their gas production and marketing arms as arms-length affiliates and provided that the new affiliates could have no advantage over other pipeline customers. The main purpose of Order No. 636 is to give both natural gas producers and purchasers an even playing field on which to sell, purchase, and transport natural gas.

To protect the efficient and reliable national natural gas market that we enjoy today, both the courts and

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[6] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regs. Preambles ¶ 30,939, order on reh'g, Order No. 636-A, FERC Stats. & Regs., Regs. Preambles ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *aff'd in relevant part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir.), *cert. denied*, 520 U.S. 1224 (1997).

the FERC have recognized that natural gas in an interstate pipeline is in interstate commerce and should be free from regulation by individual states. *See Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

B. This Court Has Long Safeguarded The Federal Government's Regulatory Control Over The Interstate Market.

Driven by Congressional policy and FERC regulations, the Supreme Court has long held that the NGA was designed to unify regulation of the wholesale market and to place authority over that market in FERC. The Court has repeatedly taken a dim view of approaches that allow states to "disturb[] the uniformity of the federal scheme," explaining that such state regulation could "seriously impair [FERC's] authority to regulate" jurisdictional sellers because those sellers "will be forced to comply with varied state regulations of their . . . practices." *Transcontinental Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 420, 423 (1986).

The development of the natural gas industry has been of critical importance to the development of the United States. Given the abundance of natural gas and the efficient and reliable single, national market regulated by the FERC that allows producers and purchasers to choose the most efficient means of obtaining and transporting gas, the natural gas industry remains vitally important to the national interests of the United States and all of its citizens. On behalf of its members, the AGA suggests that the Court should grant certiorari in this case and hold that the Ninth Circuit's pre-emption analysis is at odds with both the letter and spirit of the federal government's regulatory scheme and in conflict with

the national interest in having a single, efficient, and re-liable market for natural gas.

This case gives the Court the opportunity to re-affirm that the wholesale market—including practices, such as price reporting, that affect the wholesale market—is an area preempted from the states' jurisdiction.

II. THIS COURT SHOULD GRANT CERTIORARI TO GIVE ADDITIONAL GUIDANCE ON THE STATES' ROLE IN REGULATING INTERSTATE NATURAL GAS MARKETS

This Court has continuously clarified the extent of the federal government's regulation of the interstate natural gas market. See, e.g., *Natural Gas Pipeline Co. of Am. v. Panoma Corp.*, 349 U.S. 44, 75, S.Ct. 576, 99 L.Ed. 866 (1955) (holding that Oklahoma law was preempted); *Phillips*, 347 U.S. U.S. 672 , 98 L. Ed. 1035, 74 S. Ct. 794 (1954) (independent natural gas producers selling gas to interstate pipeline companies are subject to Federal Power Commission regulation); *Ill. Natural Gas Co. v. Central Ill. Public Service Co.*, 314 U.S. 498 (1941) (holding that Illinois law was preempted); *Northern Natural Gas Co.. v. State Corporation Commission*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963) (state law which required that an interstate pipeline company purchase gas ratably from all wells connected to its pipeline system in each gas field within the State unduly interfered with the exclusive federal authority to regulate inter-state sales under the NGA); and *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed. 2d 316 (1988) (state statute requiring natural gas companies to obtain approval from a state public service commission before issuing long-term securities

was preempted by the NGA). The present case presents the Court with another opportunity to guide states and market participants to understand the extent of federal preemption in this area and the breadth of the NGA.

"The NGA long has been recognized as a 'comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce'" *Schneidewind*, citing *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 91 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954). Further, it is well settled that " . . . Congress occupied the field of matters relating to whole-sale sales and transportation of natural gas in interstate commerce." *Schneidewind* at 305. This exercise of its authority was " . . . to achieve the uniformity of regulation [over sales and transportation] which was an objective of the Natural Gas Act . . ." *Schneidewind* at 331-332 quoting *Northern Natural Gas Co.*, 372 U.S. at 91-92.

This "federal regulatory scheme leaves no room either for direct state regulation of prices or interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *Northern Natural*, 372 U.S. at 91 (citations and footnotes omitted).

The plaintiff-respondents are industrial or commercial users of natural gas that chose to negotiate their own natural gas purchases. Their case is premised on an alleged conspiracy by defendant-petitioners to inflate published index prices that were used to set natural gas prices in wholesale transactions and in the kinds of retail purchases negotiated by plaintiff-respondents.

Price index reporting is an essential element of a well-functioning competitive market for natural gas. In a competitive market, price index reporting not only serves to set the price of natural gas sales, for those transactions tied to the index, it also enables FERC to monitor the market to ensure that prices remain just and reasonable pursuant to its statutory mandate under the Natural Gas Act. In furtherance of that goal, FERC required natural gas sellers subject to its jurisdiction to abide by a Code of Conduct regarding the price index reporting. *See* Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323 (Nov. 26, 2003).

Pursuant to the Natural Gas Act, FERC has jurisdiction to regulate any practice that directly affects rates subject to its jurisdiction. 15 U.S.C. 717d. Price index reporting is just such a practice. The fact that the plaintiff-respondents were retail purchasers in the state-regulated retail market is irrelevant. Their state law claims are preempted because the alleged price index manipulation would have directly affected wholesale rates subject to FERC's jurisdiction. Moreover, the fact that FERC no longer exercises rate regulation over a portion of the wholesale natural gas market is also irrelevant. Price index reporting directly affects wholesale rates in a competitive market, and is an essential element of FERC's enforcement effort to ensure the competitive market functions efficiently to produce just and reasonable rates. The plaintiff-respondents' causes of action seek redress for the very conduct which the federal government has undertaken to regulate.

The scheme of federal regulation is so pervasive and deliberate as to make reasonable the inference that Congress left no room to the States to supplement it.

Permitting the causes of action to go forward will thwart the two primary elements of the federal statutory scheme: national uniformity and freedom from burdensome government intervention.

The Court is right to guard against state fragmentation of natural gas regulation. One cornerstone underlining the development of a robust natural gas industry has been that a single regulator, expert in how it works, oversees the operation. The NGA enables FERC to issue clear rules identifying what is, and what is not, proper conduct. That has enabled natural gas companies to conform their conduct to a definitive set of regulations, and to seek FERC guidance whenever the guidelines are uncertain. Moreover, Congress gave FERC a balanced set of enforcement tools for it to apply even-handedly through the interstate markets.

A contrary approach, splitting authority over wholesale-market practices between the federal government and the states, would be unworkable. "[T]he conclusion that there is no preemption leads to the imposition on interstate natural gas wholesalers 50 different sets of state rules concerning anti-comptitive behavior. . . . the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Nevada ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186, 1193 (Nev. 2012), *cert. denied*, 133 S.Ct. 2853 (2013) (citing *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010)).

CONCLUSION

For the foregoing reasons, amicus urges this Court to grant the subject Petition for Writ of Certiorari.

Respectfully submitted,

KEVIN B. BELFORD
MICHAEL L. MURRAY
Counsel of Record
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW
Suite 450
Washington, DC 20001
(202) 824-7070
mmurray@aga.org

Counsel for Amicus Curiae

September 27, 2013

AMICUS CURIAE BRIEF

No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., et al.,

Petitioners,

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LEARJET INC. et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ELECTRIC POWER SUPPLY ASSOCIATION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, NATURAL GAS SUPPLY ASSOCIATION, AND WESTERN POWER TRADING FORUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., N.W.
Suite 404
Washington, DC 20015
tg@goldsteinrussell.com

Additional Counsel on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

John E. Shelk
ELECTRIC POWER SUPPLY
ASSOCIATION
1401 New York Ave., N.W.
Suite 1230
Washington, DC 20005

Joan Dreskin
INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA
20 F Stt., N.W.
Suite 450
Washington, DC 20001

Alan Z. Yudkowsky
LAW OFFICES OF ALAN Z. YUDKOWSKY
WESTERN POWER TRADING
FORUM
26500 W. Agoura Rd.
Suite 223
Calabasas, CA 91302

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INTEREST OF *AMICI CURIAE*[1]

The Electric Power Supply Association ("EPSA") is a national trade association that represents the competitive power industry and is incorporated under the laws of the District of Columbia. EPSA's members include sixteen companies, along with numerous supporting members, and state and regional partners that represent the competitive power industry in their respective regions. The competitive (non-utility) generation sector as a whole represents forty percent of the installed electric generating capacity in the United States. As providers and marketers of wholesale power supply, EPSA members have significant financial investments in electric generation and electricity marketing operations across the country. Although the decision below construed the Natural Gas Act ("Natural Gas Act" or "NGA"), 15 U.S.C. §§ 717 *et seq.*, and though the two statutes are distinguishable in certain relevant respects, precedents construing the NGA often are invoked in interpreting the similar provisions of the Federal Power Act ("Federal Power Act" or "FPA"), 16 U.S.C. §§ 791a *et seq.*, which governs interstate markets for electricity. *See, e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981). EPSA's members compete in the wholesale electricity markets and would be affected by any extension of

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[1] *Amici* provided respondents with timely notice of their intent to file this brief. All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

the Ninth Circuit's decision to electricity matters. EPSA's organizational purpose is, among other things, to promote a favorable market environment for the competitive electric industry; to support the development of state and federal legislative and regulatory policies that encourage the development and implementation of competitive wholesale markets for electricity; and to improve the public's awareness of the competitive electric industry. In furtherance of this mission, EPSA has participated as an *amicus* in a number of cases before this Court. *See, e.g., Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527 (2008).

The Interstate Natural Gas Association of America ("INGAA") is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents virtually all of the interstate natural gas transportation pipeline companies operating in the United States, as well as comparable companies in Canada. Its members transport the vast majority of the nation's natural gas through a network of 200,000 miles of pipelines and also operate many interstate natural gas storage facilities. INGAA's members only transport gas; they do not sell it. INGAA's members are regulated by the Federal Energy Regulatory Commission under the Natural Gas Act. INGAA and its individual members have a substantial interest in contract stability, rate certainty, continued investment in energy infrastructure, and in ensuring predictable, rational,

and fair law and policy affecting natural gas transportation. To advance those interests INGAA regularly participates as an *amicus* in cases concerning the proper regulation of the industry. *See, e.g.*, *Morgan Stanley*, 554 U.S. 527.

The Natural Gas Supply Association ("NGSA") is a trade association that represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers. Members of NGSA account for approximately thirty percent of the domestic natural gas production and are shippers on interstate pipelines. NGSA has previously participated as an *amicus* in cases before this Court. *See, e.g.*, *Morgan Stanley*, 554 U.S. 527.

The Western Power Trading Forum ("WPTF") is a California non-profit, public benefit corporation. It boasts a broad-based membership of energy service providers, scheduling coordinators, generators, power marketers, financial institutions, energy consultants, and public utilities, dedicated to enhancing competition in Western electric markets while maintaining the region's current high level of system reliability. WPTF supports development of competitive markets throughout the West and the establishment of uniform rules to facilitate transactions among market participants. To that end, WPTF has participated in important cases where federal courts' decisions have threatened to

disrupt the orderly functioning of the electricity markets. *See, e.g., NRG Power Mktg.*, 558 U.S. 165; *Morgan Stanley*, 554 U.S. 527.[2]

SUMMARY OF ARGUMENT

The success of our economy depends in no small part on a vibrant, efficient interstate energy market. For the past three-quarters of a century, our nation has fostered the effective production and distribution of energy through a system of shared regulatory authority between the states and the federal government. That system depends on maintenance of clear, predictable, and sensible lines dividing what subjects are left to the states and what subjects fall within the exclusive jurisdiction of the federal agency Congress charged with regulating interstate transportation and wholesale sales of natural gas and electricity.

The Ninth Circuit's decision in this case has thrown the traditional division into disarray. It has long been understood that under the Federal Power Act and the Natural Gas Act, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to regulate the interstate transportation of natural gas and electric transmission as well as the wholesale sales for resale of natural gas and electricity (so-called "jurisdictional sales"). By contrast, states retain jurisdiction over, among other

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[2] This brief represents the position of EPSA, INGAA, NGSA and WPTF as organizations, but not necessarily the views of any particular member with respect to any issue.

things, retail sales.[3] In this case, the Ninth Circuit confronted a practice (alleged manipulation of natural gas price indices) that is "associated with" both jurisdictional and non-jurisdictional sales. The Ninth Circuit held that federal law did not preempt state antitrust claims based on the alleged manipulation of the indices because the indices were associated with non-jurisdictional sales (such as retail sales).

That holding turns established federal preemption doctrine on its head and threatens to substantially disrupt the wholesale energy industry. The industry has long understood that if a practice falls within federal jurisdiction, that jurisdiction is exclusive; there is no need to survey the law of all the states (including often vague antitrust and consumer protection statutes) to determine the standard with which the industry must comply. But the principle applied in this case opens the door to massive litigation against transporters and sellers of wholesale gas and electricity whenever the plaintiffs' bar is able to hypothesize some plausible association between the challenged conduct and retail prices *even when* the conduct would otherwise obviously fall within FERC's jurisdiction. For example, an end user might sue a natural gas pipeline for taking part

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[3] "Jurisdictional sales" refers to transactions falling within FERC's jurisdiction, including, for example, interstate sales of gas for resale. *See* Pet. App. 16a. "Non-jurisdictional sales" refers to transactions falling outside of FERC's jurisdiction, such as retail sales and "first sales." *Id.* 17a.

of its pipeline off line for repairs in response to a natural disaster, as authorized by the pipeline's FERC-approved tariff, on the theory that the action illegally increased retail prices.

This result is untenable. Congress established a national expert energy regulator precisely to avoid the confusion, inefficiency, and unfairness that arise when interstate commerce is subject to separate (and potentially conflicting) regulation by each of the forty-eight states plus the District of Columbia that buy and sell natural gas and electricity in interstate commerce.[4] Unless and until reversed by this Court, the decision in this case will engender uncertainty in the energy industry that will interfere with long-term planning, encourage litigation, and increase energy costs at a time when our economy can least afford it.

ARGUMENT

I. The Ninth Circuit's Decision Threatens The Careful Division Of Jurisdiction Congress Established For The Natural Gas And Electric Power Industries.

A well-functioning energy industry is vital to the national economy. The United States has an abundant, diverse supply of natural gas that can be developed prudently and economically as well as a well-developed natural gas transportation infrastructure that provides consumers with access to

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[4] There are no sales of natural gas or electricity in interstate commerce in Alaska or Hawaii.

that supply.[5] The enormous increase in proven and probable reserves in North America has provided tangible benefits to consumers in the form of lower home heating and electricity bills, revitalized the United States industrial market, and accelerated the power generation industry's move to natural gas. Natural gas production companies in the United States employed 600,000 people, generating $180 billion in labor income for American workers in 2012 alone. The development of shale gas is projected to add 1.4 million more jobs domestically by 2035.[6]

To take advantage of this abundant resource, the United States and Canada will require investments in natural gas gathering, processing, storage, and pipeline infrastructure in excess of $205 billion over the next twenty-five years. This will include 1400 miles per year of interstate pipelines.[7]

The success of our national energy markets depends in significant part on the maintenance of a sensible, predictable, and stable regulatory regime.

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[5] *See* Energy Information Administration, *Annual Energy Outlook 2012 Early Release Overview*, *available at* http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2012).pdf.

[6] *See* IHS Global Insight, *America's New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy*, *available at* http://www.ngsa.org/download/analysis_studies/Americas_New_Energy_Future_State_Highlights_Dec2012.pdf.

[7] *See* The INGAA Foundation Inc., *North American Natural Gas Midstream Infrastructure Through 2035: A Secure Energy Future*, June 28, 2011, *available at* http://www.ingaa.org/File.aspx?id=14911.

The Ninth Circuit's decision in this case, however, threatens to disrupt well-functioning interstate wholesale energy markets by sowing confusion and uncertainty regarding the proper division of state and federal authority over an increasingly important sector of the nation's economy The petition therefore should be granted.

A. Congress Has Long Retained Exclusive Federal Authority Over Interstate Energy Transactions.

Because natural gas basins and electric generation are situated unevenly throughout the country, often far from consumption areas, the interstate sale and movement of natural gas and electricity across state lines have long been the norm in most parts of the nation. Over the decades, the natural gas and electric power industries have invested billions of dollars to develop the infrastructure needed to efficiently produce, transport, and distribute energy to every corner of the country, often providing energy that is cheaper and cleaner than is locally available.

In the early decades of the last century, Congress recognized that the inherently interstate nature of the national markets for electricity and natural gas required uniform, federal regulation. *See, e.g.*, 15 U.S.C. § 717(a) (finding that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest"); 16 U.S.C. § 824(a) (same with respect to electricity). Congress intended the federal government to retain jurisdiction over the interstate transportation of natural gas and wholesale sales of natural gas and

electricity even in those instances in which FERC does not have complete jurisdiction over all commodity sales.

Accordingly, in the Federal Power Act and the Natural Gas Act, Congress invested the Federal Power Commission (FERC's predecessor) with exclusive authority to regulate the interstate transportation and wholesale sales of electricity and natural gas.[8] This Court has long recognized that state regulation of practices falling within FERC's jurisdiction "disturb[s] the uniformity of the federal scheme" Congress intended, by forcing energy companies "to comply with varied state regulations" rather than the single regulatory regime established by an expert federal commission. *Transcon. Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 423 (1986). For that reason, it is "common ground that if

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[8] To be sure, there are important and relevant distinctions between FERC's jurisdiction over, and its regulation of, rates for wholesale sales (*i.e.*, sales for resale) under the FPA and the NGA. In the case of sales for resale of natural gas, Congress has decontrolled rates for so-called "first sales," *see* 15 U.S.C. § 3431(b)(1)(A), and FERC has, by regulation, pre-authorized non-"first sales" at "negotiated rates," *see* 18 C.F.R. §§ 284.402(a), 284.284(a). In contrast, wholesale sales of electricity in interstate commerce remain subject to comprehensive and seller-specific rate regulation by FERC under the FPA. *See, e.g.*, 18 C.F.R. §§ 35.36-35.42. Nonetheless, because the FPA and NGA share common language that has long been read "interchangeably," *see, e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); Pet. App. 33a n.12, there is a significant risk that the Ninth Circuit's decision in this case will be cited as precedent for suits against electricity suppliers as well as members of the natural gas industry.

FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment); *see, also, e.g., id.* at 377 ("[A] state agency's effort to regulate" interstate electricity transportation or wholesale sales "must fall when they conflict with or interfere with federal authority over the same activity."); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) ("Congress has occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.").

B. The Ninth Circuit's Decision In This Case Departs From Settled Preemption Principles And Threatens To Sow Confusion And Uncertainty In The Energy Industry.

Despite this Court's prior decisions, the Ninth Circuit held in this case that states may regulate conduct otherwise falling within FERC's exclusive jurisdiction, so long as the practice *also* is "associated with" a subject falling within state jurisdiction, such as a practice that has an effect on both wholesale and retail prices. Pet. App. 36a. That conception of preemption threatens to unravel the careful division of regulatory authority Congress intended and to generate great uncertainty in the natural gas and electric power industries.

1. Petitioners are natural gas marketing companies that buy and sell natural gas in the wholesale market, and also sell gas directly at retail to industrial and commercial consumers for their own use. Rates in both wholesale and retail transactions

often are set with reference to "index prices" published by trade publications based on survey responses from various market participants.[9] Pet. App. 13a-14a. Respondents, industrial and commercial retail purchasers of natural gas, brought state law antitrust claims alleging that petitioners unlawfully manipulated the index prices by providing false information in the surveys used to compile the indexes and by engaging in "wash sales" that artificially affected market prices. *Id.* 12a & n.1. This alleged unlawful conduct would have directly affected transaction prices in both the FERC-jurisdictional wholesale market and the retail market to the extent transactions in those markets were priced with reference to a manipulated published index price. Or, in the Ninth Circuit's parlance, the alleged misconduct could be considered "associated with" both the jurisdictional and non-jurisdictional sales. *Id.* 24a.

The Ninth Circuit thus viewed the case as presenting the question whether "Section 5(a) of the NGA . . . preempt[s] state antitrust claims arising out of price manipulation associated with transactions falling outside of FERC's jurisdiction." *Id.* 24a. Applying a presumption against preemption, the court adopted a "narrow reading" of the NGA's preemptive effect. *Id.* 23a-24a. It held that "the NGA does not preempt state antitrust challenges to rates and practices associated with . . . non-

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[9] The indices reflect a single price that does not distinguish between wholesale and retail sales; there is not, for example, a separate index for wholesale prices and another for retail prices.

jurisdictional sales," even if those practices *also* are associated with, and affect, jurisdictional rates. *Id.* 36a. To allow FERC exclusive jurisdiction over practices affecting both wholesale and retail sales, the court believed, would amount to excluding state jurisdiction over "the same transactions (first sales and retail sales) that Congress expressly exempted from the scope of FERC's jurisdiction." *Id.* 28a.

Under this standard, there was no preemption in this case because the alleged manipulation was associated with both jurisdictional and non-jurisdictional sales. *Id.* 24a.

2. As petitioners have shown, there is no basis in this Court's precedents for the Ninth Circuit's conclusion that a practice otherwise falling within federal jurisdiction may nonetheless be subject to state regulation and litigation so long as it also affects retail prices or other non-jurisdictional sales. The fact that FERC has not been given jurisdiction over *all* sales of natural gas does not diminish the NGA's preemptive effect on state regulation of *practices* that *do* fall within the federal government's jurisdiction. *See, e.g.*, *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 865-67 (Tenn. 2010).

The Ninth Circuit's contrary holding has thrown into doubt longstanding understandings about what industry practices are subject to exclusive federal jurisdiction and when the industry must look to state law to decide how to conduct its business. After the Ninth Circuit's ruling, the plaintiffs' bar need only hypothesize some plausible connection between a practice ordinarily falling within FERC's jurisdiction and retail prices in order to justify bringing suit for potentially billions of dollars on state-law grounds

before a lay jury in any state in the Union. Because of the close connection between wholesale and retail prices, *many* practices falling within federal jurisdiction over wholesale sales *also* affect retail prices, just as they would in any industry. For example, if an interstate pipeline announced pursuant to its FERC-approved tariff that it needed to reduce pipeline capacity in response to a natural disaster, and thus could not satisfy all of its contractual commitments to deliver gas to its customers, an industrial end user might argue that its cost of purchasing natural gas at retail was greater than it should have been due to the pipeline's actions of reducing its transportation capacity. Similarly, if FERC authorized a pipeline to increase its tariff rates due to an accounting modification, for example, an industrial end user might argue that it paid too much at retail for the cost of gas due to the pipeline's rate increase at wholesale.

Allowing state litigation over practices properly falling within federal jurisdiction undermines the foundation of the national regulatory regime by subjecting energy companies to the multiple, potentially conflicting demands of forty-eight different state masters and the District of Columbia. Because it may be difficult, if not impossible, to conduct business differently in different states, the practical effect of overlapping state and federal authority may well result in companies having to comply with the most restrictive of the various state rules. As a result, FERC's expert judgment as to practices that it has deemed permissible or even advantageous for the economy may be effectively forbidden by a handful of more parochial state regulatory interests. And even when companies are

not subject to directly conflicting commands, discerning and complying with multiple regulatory regimes substantially increases the cost, and decreases the efficiency, of the national energy markets. Moreover, the problem is exacerbated when the state rule effectively is implemented through litigation before lay juries, under often-vague state antitrust or consumer protection statutes, rather than by expert agencies through a deliberate administrative process.

Just the uncertainty that the Ninth Circuit's decision creates over the proper division of regulatory authority between states and the federal government is harmful. Even if questions of federal preemption are eventually resolved correctly — either by subsequent decisions of the lower courts or by this Court — delay in bringing clarity to the law subjects the industry to uncertainty that can interfere with long-term planning, discourages needed capital investment, increases operating costs, and degrades the overall efficiency of the energy system. Only the intervention of this Court, and the re-establishment of settled preemption principles, can restore the clarity and proper division of regulatory authority this important segment of the national economy requires.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

John E. Shelk
ELECTRIC POWER SUPPLY ASSOCIATION
1401 New York Ave., N.W.
Suite 1230
Washington, DC 20005

Joan Dreskin
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
20 F St., N.W.
Suite 450
Washington, DC 20001

Alan Z. Yudkowsky
LAW OFFICES OF ALAN Z. YUDKOWSKY
WESTERN POWER TRADING FORUM
26500 W. Agoura Rd.
Suite 223
Calabasas, CA 91302

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., N.W.
Suite 404
Washington, DC 20015
tg@goldsteinrussell.com

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AMICUS CURIAE BRIEF

No. 13-271

In the Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., ET AL.,

Petitioners,

v.

LEARJET INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE GAS PROCESSORS ASSOCIATION IN SUPPORT OF PETITIONERS

Robert R. Reis
General Counsel
Gas Processors Association
6526 E. 60th Street
Tulsa, OK 74145
(918) 742-2028
robertreis@sbcglobal.net

Paul I. Korman
Counsel of Record
Van Ness Feldman LLP
1050 Thomas Jefferson St., N.W.
Suite 700
Washington, D.C. 20007
(202) 298-1800
pik@vnf.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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STATEMENT OF INTEREST[1]

The Gas Processors Association (GPA) has served the U.S. energy industry since 1921 as an incorporated nonprofit trade association. GPA is composed of 130 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (NGLs) such as ethane, propane, butane, and natural gasoline. GPA members account for over 90% of the NGLs produced in the United States from natural gas processing.

This case is of importance to GPA and its members, because the U.S. Court of Appeals for the Ninth Circuit's decision imposes new regulatory burdens on GPA members' natural gas transportation, marketing, and sales activities downstream of those members' gas processing plants and gas gathering systems, which activities are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). Under the Ninth Circuit's decision, a direct industrial purchaser of natural gas that thinks itself aggrieved by a midstream practice can evade FERC jurisdiction and cast about for a friendly state forum willing to impose more onerous restrictions than FERC. That is no way

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[1] This brief is filed with the consent of the parties. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

to conduct national gas policy. As courts have recognized, one of the principal purposes of the Natural Gas Act (NGA), 16 U.S.C. §§ 717 *et seq.* (2012), is to protect national natural gas policy from the influence of state regulators "with only local constituencies." *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571, 579 (2d Cir. 1990), *cert denied*, 497 U.S. 1004 (1990). The Ninth Circuit's decision is contrary to that critical purpose because it effectively turns over regulation of practices affecting the wholesale natural gas market to insular state courts and legislators.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision authorizes states to regulate practices that the NGA delegates to FERC. That decision, if left unreviewed, will impose new and unnecessary costs on natural gas companies, including midstream companies, as they struggle to conform to additional layers of potentially conflicting regulation. And it will allow state rules to oust FERC's rules regulating midstream activities promulgated under the NGA. Congress enacted the NGA to provide for federal regulation of natural gas companies. This Court should follow its prior precedents rejecting state infringement on the NGA. The Petition should be granted and the decision below should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONDONES STATE ATTEMPTS TO REGULATE ACTIVITIES WITHIN THE EXCLUSIVE JURISDICTION OF FERC THROUGH THE BACK DOOR OF RETAIL RATE REGULATION.

From this Court's earliest opinions on natural gas regulation, it has held that with respect to the interstate natural gas industry, "[t]he paramount interest is not local but national, admitting of and requiring uniformity of regulation." *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 309-310 (1924). That observation is as sound today as it was in 1924. Absent uniform federal regulation, interstate natural gas regulation would be effectively left in the hands of state regulators, regulators that often elevate local concerns above the needs for an efficient, competitive natural gas market. *See National Fuel Gas Supply Corp.*, 894 F.2d at 579. The genius of the NGA was to counteract the protectionist impulses of state and local regulators by placing regulation of the interstate wholesale market in the hands of "FERC, a federal body that can make choices in the interests of energy consumers nationally[.]" *Id.*

The Supreme Court has also recognized that state regulators could use their power over their retail markets to attempt to control wholesale practices with which they disagree. The Court accordingly has taken a dim view of stratagems that permit states to "disturb[] the uniformity of the federal scheme," explaining that they "seriously impair [FERC's]

authority to regulate" jurisdictional sellers, because those sellers "will be forced to comply with varied state regulations of their . . . practices." *Transcontinental Pipe Line Corp. v. State Oil & Gas Board of Kansas*, 474 U.S. 409, 420, 423 (1986) (quoting *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 984, 92 (1963)), *reh'g denied*, 475 U.S. 1091 (1986).

In order to protect the national gas market from local regulations that purport to regulate local concerns, but actually interfere with the interstate market, the Supreme Court has explained that state regulation is preempted, regardless of its nominal subject area, if it is "directed at . . . things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) (footnote omitted).

In *Schneidewind*, for instance, the Court found preempted a Michigan statute requiring companies that transported natural gas in interstate commerce and into the state to obtain state approval before issuing securities. Even though the NGA did not expressly authorize FERC to regulate the issuance of securities, the Court found the law preempted, because it "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. The Michigan law's purpose was to keep natural gas companies from raising their equity levels above a certain point, so as to make sure the "company will charge only what Michigan considers to be a 'reasonable rate.' That

[was] a regulation of rates" governed exclusively by the NGA, and the statute was therefore preempted. *Id.* at 308.

In *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 360 n.6 (1988), similarly, the Court held that an agreement among four power companies allocating power from a nuclear power plant was a "contract affecting the wholesale rates . . . of those companies." The Court therefore held that Mississippi could not regulate the contract through its undisputed power to regulate retail rates. *Id.* at 374. The Court's reasoning was simple: "States may not regulate in areas where FERC has properly exercised its jurisdiction to . . . insure that agreements affecting wholesale rates are reasonable." *Id.* And that was true even though Mississippi was purporting to exercise its power to regulate the retail market. *Id.*

The Court's pragmatic approach to natural gas preemption—focusing on the effect of the regulation on the interstate market, rather than what it purports to regulate—makes sense in light of the goals of the NGA. If the Court is to honor Congress' goal of preventing local regulators from meddling in matters of national natural gas policy, the Court must continue to be on guard against states attempting to use their regulatory power over the retail market to sneak in wholesale regulation through the back door.

The Ninth Circuit's opinion fails to honor these important goals. Under the Ninth Circuit's opinion, the practical effect of a state regulation—including state antitrust laws—on FERC's ability to regulate the interstate natural gas market is irrelevant. Instead,

all that matters is that the plaintiff purchased its particular natural gas in retail transactions outside of FERC's jurisdiction. But that reasoning opens up interstate natural gas companies to all forms of state regulation under the guise of the state regulating retail transactions not under FERC's control. Review is warranted to ensure that Congress's intended role for FERC as the regulator of the interstate natural gas market, a role repeatedly recognized and protected by this Court, is preserved.

II. THE DECISION BELOW CREATES ADDITIONAL, COSTLY REGULATORY BURDENS FOR MIDSTREAM COMPANIES AND THREATENS FERC-APPROVED PRACTICES.

The decision below also imposes additional, expensive regulatory burdens on natural gas midstream companies. Under the Ninth Circuit's rule, so long as a plaintiff alleges its natural gas was purchased in a transaction not subject to FERC's jurisdiction, the states can regulate any practice relating to the transaction, even if it is a practice that is subject to FERC oversight.

As a consequence, where FERC has authority over their activities, midstream companies can no longer focus their compliance efforts on implementing FERC-approved practices under FERC's precedent. Instead, companies must determine whether their practices are affecting retail rates in each of the states in which they operate. If so, companies must then conform those

particular practices to the demands of each state's laws. This effectively destroys the scheme of regulation implemented by the NGA.

That would create tremendous practical difficulty for FERC-regulated companies. For midstream natural gas companies operating in the wholesale market and engaged in interstate sales of natural gas for resale and interstate transportation of natural gas, their practices do not change from state to state.

Even if the practical difficulties can be hurdled, the duplicative regulatory burden that the Ninth Circuit's rule creates will impose significant costs on midstream companies. On the state level, a study of insurance companies' compliance costs has found that multistate regulation increases expenses and premiums by 26 percent. Tyler Leverty, *The Cost of Duplicate Regulation*, Insurance Journal (May 21, 2012), *available at* http://www.insurancejournal.com/magazines/features/2012/05/21/248069.htm. Indeed, President Obama has declared that eliminating such cost and overlap "is the operating principle of our government." Barack Obama, Op-Ed, *Toward A 21st-Century Regulatory System*, Wall St. J., Jan. 18, 2011. But the Ninth Circuit's opinion authorizes states to impose an unprecedented set of burdensome regulations on midstream companies to the extent their activities are regulated by FERC.

In many cases, however, midstream companies may not be able—either for reasons of cost or logistics—to tailor their practices on a state-by-state level. In those cases, companies must make their practices conform to the rules of the most restrictive state—in other words,

conform to the lowest common denominator among all the states in which they operate. *See* Dillon Klepetar, *Technology-Forcing and Law-Forcing: The California Effect in Environmental Regulatory Policy* § 4.1 (2012) (Western Political Science Association, 2012 Annual Meeting), *available at* http://wpsa.research.pdx.edu/meet/2012/klepetar.pdf. That approach, however, would make states, not FERC, the primary regulator of practices that affect both wholesale and retail natural gas rates. That result runs contrary to the Supreme Court's cases and Congress's intent.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

Paul I. Korman
Counsel of Record
Van Ness Feldman LLP
1050 Thomas Jefferson St., N.W.
Suite 700
Washington, D.C. 20007
(202) 298-1800
pik@vnf.com

Robert R. Reis
General Counsel
Gas Processors Association
6526 E. 60th Street
Tulsa, OK 74145
(918) 742-2028
robertreis@sbcglobal.net

Counsel for Amicus Curiae

September 27, 2013

AMICUS CURIAE BRIEF

No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by end users who purchased gas in retail transactions?

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IN THE

Supreme Court of the United States

NO. 13-271

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited, accountable government. To that end, WLF regularly appears as *amicus curiae* before this Court in cases involving preemption issues, to point out the economic inefficiencies that often result when multiple layers of government seek to regulate the same activity. *See, e.g.*, *Bates v. Dow AgroSciences*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

LLC, 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). WLF also participates in important preemption cases where liability under state tort laws threatens the predictability and uniformity provided by federal regulatory schemes. *See, e.g., Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state antitrust law, imposes upon an entire industry an unnecessary layer of regulation that frustrates the objectives or operation of specific regulatory regimes, such as (in this case) the Natural Gas Act (NGA) and the Federal Energy Regulatory Commission (FERC). The rule adopted by the Ninth Circuit exposes natural gas companies to massive state regulation—in the form of state antitrust liability—for conduct that is the exclusive province of a comprehensive federal regulatory regime.

WLF is also concerned that the Ninth Circuit's approach to preemption under the NGA would result in a windfall for enterprising plaintiffs' attorneys, who can circumvent FERC's comprehensive regulatory scheme by simply identifying some practice of interstate gas companies that impacts gas prices, locating a plaintiff who purchased natural gas at retail, then filing suit seeking damages under state consumer protection laws. WLF firmly believes that FERC, not the plaintiffs' bar, should be deciding how interstate natural gas practices are regulated.

STATEMENT OF THE CASE

In 1938, Congress enacted the NGA, which gives the federal government exclusive authority to regulate the wholesale natural gas market, including the practices of natural gas companies affecting wholesale gas rates. *See* 15 U.S.C. § 717 *et seq.* Under Section 1(b) of the NGA, the FERC enjoys exclusive jurisdiction over (1) the "transportation of natural gas in interstate commerce," (2) most sales of natural gas at wholesale, and (3) "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b).

The NGA also authorizes FERC to ensure that rates for jurisdictional sales are "just and reasonable." 15 U.S.C. § 717c. To accomplish this aim, Section 5 of the NGA empowers FERC to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a).

Petitioners are natural gas companies governed by the NGA and FERC's comprehensive regulatory scheme. Respondents, several commercial and industrial end users of natural gas, sued Petitioners in various states under state antitrust law. Pet. App. 67a. Respondents' complaints alleged that Petitioners had engaged in a practice of improperly inflating index rates for natural gas, which allegedly caused Respondents to pay higher

retail rates.[2] *Id.* at 14a-15a. The Panel on Multidistrict Litigation consolidated the suits in the District of Nevada. *Id.* at 12a.

Because the evidence was undisputed that Petitioners' alleged practices would necessarily increase wholesale gas prices as well as retail prices, Petitioners moved for summary judgment on the grounds that Respondents' state-law claims were preempted by the NGA. Pet. App. 110a-111a. In other words, Petitioners argued that Respondents' state law claims sought to regulate a "practice . . . affecting" wholesale gas rates under 15 U.S.C. § 717(d)a. *See id.* at 111a.

The district court agreed. Granting summary judgment in favor of Petitioners, the court found that any index manipulation by Petitioners would have unquestionably affected jurisdictional wholesale gas rates. Pet. App. 110a-111a. As a result, the practices challenged by Respondents under state law were subject to FERC's authority over jurisdictional sellers, and thus the state law claims were preempted. *Id.* at 75a. As the district court explained, "[b]ecause FERC's jurisdiction is exclusive where it exists, any state law claims based on any such practices [i.e., those affecting wholesale gas rates] are preempted." *Id.*

On appeal, the Ninth Circuit reversed. Pet. App. 25a. Relying on its earlier opinion in *E. & J.*

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[2] Index rates are published rate compilations, as reported by industry publications, which buyers and sellers use to price natural gas in the wholesale and retail markets.

Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1037 (9th Cir. 2007), a decision based almost entirely on the filed-rate doctrine, the appeals court rejected the district court's holding that the NGA provides for exclusive federal jurisdiction over any practice by a FERC-jurisdictional seller than affects jurisdictional rates. Pet. App. 25a-28a. The panel concluded that federal preemption turns not on whether the lawsuit would have the effect of regulating in the federal field, but rather on the specific kind of transaction (retail or wholesale) by which plaintiffs sustained their alleged injuries. *Id.* According to the appeals court, because Respondents allegedly suffered harm in retail transactions, and the NGA does not regulate retail sales, no preemption exists. *Id.* Under the Ninth Circuit's view, then, state antitrust law trumps FERC's plenary authority anytime a practice affecting wholesale rates also happens to affect retail rates.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding simply cannot be squared with this Court's longstanding preemption precedents under the NGA. Since Congress enacted the NGA in 1938, the Court has consistently recognized that Congress intended the NGA to unify regulation in the natural gas wholesale market and to squarely place authority over that market with FERC. At the same time, the Court has taken a dim view of those approaches, such as the one adopted below, that would allow states to disturb the uniformity of the federal scheme that Congress set in place. In drawing the line between state regulations that impair FERC's authority from those that do not, the Court has emphasized that state regulation is

preempted if it is "directed at . . .things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

The decision below ignores this well-settled view. Under the Ninth Circuit's approach, Respondents' claims are not preempted because they invoke only the state courts' supervision of state *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But Section 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). The fact that a given practice may affect retail rates *as well as* wholesale rates is of no consequence. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-court actions are "directed at" conduct in the field that the NGA occupies. But if plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field preemption precedents will be rendered a dead letter.

The Ninth Circuit's rule is also in conflict with the Tennessee and Nevada Supreme Courts, both of which have rejected the "transactional" approach to preemption adopted below, calling it a recipe for regulatory chaos. By permitting private plaintiffs to second guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how to regulate natural gas companies' conduct affecting

wholesale rates. But if federal regulatory agencies are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free from hindrances imposed by state law, how best to regulate jurisdictional conduct in their given field of expertise.

The Ninth Circuit's preemption analysis turns not on any underlying legal principle, but on the ability of the plaintiffs' bar to identify a wholesale-market practice in the natural gas field that may also plausibly be said to affect prices in the state's retail market. Because this approach turns primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. But a single plaintiffs' lawyer should not be permitted to trump FERC by deciding whether nationwide practices affecting the wholesale market are permissible. Absent discretionary review by this Court, the Ninth Circuit's decision thus threatens to disrupt the uniform federal regime envisaged by Congress by allowing attorneys motivated by large jury awards to create potentially 50 different state regulatory regimes binding the natural gas industry.

REASONS FOR GRANTING THE PETITION

The Petition presents issues of exceptional importance to the natural gas industry as well as to natural gas consumers across the country. At issue is whether the holding below undermines Congress's federal scheme under the NGA by removing plenary regulatory discretion from FERC and placing it in the hands of state court juries. This case offers the

Court an excellent vehicle to decide whether each of the 50 states should be allowed to decide whether a given industry practice affecting both wholesale and retail sales of natural gas should be subject to state-law liability based on the state's notions of what constitutes an "anticompetitive" practice.

The interests of fairness, predictability, and stare decisis were all injured in this case. WLF joins with Petitioners in urging this Court to grant the petition for writ of certiorari.

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THIS COURT'S OWN PRECEDENTS

The question of whether a state law or rule is preempted by federal law turns on the intent of Congress, which is the "ultimate touchstone." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent of Congress can be determined if it is "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

When Congress enacted the NGA 75 years ago, it explicitly recognized the importance of uniform federal regulation of the natural gas industry. Because "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," Section 1(a) of the NGA provides that uniform regulation of such businesses "is necessary in the public interest." 15 U.S.C. § 717(a). Informed by this clear statement of Congressional policy, this Court has long held that

the NGA was intended to unify regulation in the natural gas wholesale market and to squarely place authority over that market with FERC. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 609-610 (1944) (stating that the "basic purpose" of the NGA was to "occupy the field" as to the "fixing of 'just and reasonable' rates").

At the same time, this Court has scrutinized those approaches that would allow the states to "disturb[] the uniformity of the federal scheme," in light of concerns that such state regulation might "seriously impair [FERC's] authority to regulate" jurisdictional sellers who would then "be forced to comply with varied state regulations of their . . . practices." *Transcon. Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 420-23 (1986). In distinguishing state regulations that impair FERC's authority to regulate the field from those that do not, the Court has consistently held that a state regulation is preempted, regardless of its purported subject area, if it is "directed at . . . things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

In *Schneidewind*, for example, the Court found that the NGA preempted a Michigan statute that required companies transporting natural gas in-state to obtain state approval before issuing securities. Although nothing in the NGA expressly authorizes FERC to regulate the issuance of securities, the Court nevertheless found that Michigan's law "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. In so

holding, the Court looked to the Michigan law's purpose, which was to prevent natural gas companies from raising equity levels above a certain point so as to ensure that the companies "will charge only what Michigan considers to be a 'reasonable rate.'" *Id.* at 308. The Court held that such an approach constituted a "regulation of rates" under the NGA and was thus preempted.

Likewise, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 360 n.6 (1988), the Court determined that an agreement among four power companies to allocate power from a nuclear power plant constituted a "contract affecting the wholesale rates . . . of those companies." Consequently, the Court held that Mississippi could not regulate that contract even under the State's undisputed power to regulate retail rates. *Id.* at 374. As the Court explained, "States may not regulate in areas where FERC has properly exercised its jurisdiction to . . . insure that agreements affecting wholesale rates are reasonable." *Id.* As a result, the Court found the state law preempted even though Mississippi was purporting to exercise its power to regulate the *retail* market. *Id.*

The appeals court's decision below simply cannot be reconciled with these precedents. Under the Ninth Circuit's approach, Respondents' state law claims are not preempted here because they invoke only the State's supervision of *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But that misguided approach asks the wrong question. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-law actions are "directed

at" conduct in the field that the NGA occupies. The answer to that question is yes—Respondents' suits obviously seek to punish Petitioners' alleged price-reporting and index-manipulation practices (which affect wholesale rates for natural gas as much as they affect retail rates).

Yet Section 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any[3] rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). Under this Court's longstanding NGA-preemption jurisprudence, then, Respondents' claims are preempted. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (holding that the NGA "leaves no room either for direct state regulation" in the field "or for state regulations which would indirectly achieve the same result"). But if, as the Ninth Circuit insists, plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field preemption precedents will be rendered a dead letter.

Equally misguided is the Ninth Circuit's suggestion that state antitrust laws can somehow avoid federal preemption because they merely "complement Congress's intent to move to a less regulated market" by "support[ing] fair competition."

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[3] "Read naturally, the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008). If "any" is to truly mean "any," it must also mean those practices that affect wholesale and retail rates alike.

Pet. App. 27a. As this Court has repeatedly made clear, complementarity is no defense against field preemption: "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to do." *United States v. Locke*, 529 U.S. 89, 115 (2000) (quoting *Charleston & W. Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915)). Indeed, the Court has routinely found complementary state laws preempted even if the state law in question purports to enforce exactly the same standards for exactly the same reasons. *See, e.g., Arizona v. United States*, 312 S. Ct. 2492, 2502-03 (2012) ("Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235 (1947) ("[I]f a licensed warehouseman complied with each requirement, he did all that he need do. He could not be required by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act.").

II. THE NINTH CIRCUIT'S RULE WOULD DISRUPT A UNIFORM INTERSTATE REGULATORY SCHEME AND SERVE AS AN UNNECESSARY DRAG ON FREE ENTERPRISE

By permitting private plaintiffs to second guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how to regulate the

conduct of natural gas companies that affect wholesale rates. But if federal regulatory agencies are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free from hindrances imposed by state law, how best to regulate jurisdictional conduct in their given field of expertise. At the same time, allowing juries to award damages under potentially conflicting state laws would interfere with Congress's delicate balance of statutory objectives and adoption of a uniform federal regulatory scheme, including enforcement via federal antitrust law.

Ironically, it is the *state* courts that have increasingly come to recognize just how harmful applying state antitrust laws to Petitioners' interstate practices would be. Indeed, both the Tennessee and Nevada Supreme Courts have rejected the "transactional" approach to preemption adopted below as a recipe for regulatory chaos. In *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010), the Tennessee Supreme Court rejected materially identical claims, emphasizing that "if we were to hold that this state could impose restrictions on the interstate wholesale gas market by way of its antitrust laws, we would imply that every other state could do so as well." Of course, because each state has its own unique view of how a properly "competitive" market should behave, such an approach would inexorably lead to chaos. As the court in *Leggett* concluded, a finding of no preemption would force natural gas companies to "comply with the rules of fifty different states regarding what reporting practices or transactions might qualify as competitive." 308 S.W.3d at 869.

Only last year, the Nevada Supreme Court reached the same conclusion in *Nevada ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012). Specifically rejecting the approach of the Ninth Circuit in *Gallo*, the Nevada high court explained that "[f]rom a practical standpoint, if each state intervened in this field with different regulations, the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Id.* at 1193. Consequently, the court concluded, "State antitrust law cannot coexist peacefully with the natural gas federal regulations." *Id.*

Under the Ninth Circuit's rule, whether a state is permitted (under the Supremacy Clause) to regulate any given wholesale-market practice in the natural gas field hinges on whether that practice can also plausibly be said to affect prices in the state's retail market. Because this approach turns primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. In other words, the Ninth Circuit's preemption analysis turns not on any underlying legal principle, but merely on the amply demonstrated ability of the plaintiffs' bar to identify a suitable party plaintiff.

Natural gas is a fungible commodity widely distributed through a variety of distribution channels, and the interstate markets for natural gas are closely interrelated. It only takes a modicum of imagination to argue that virtually *anything* that happens in the wholesale market, or any other area of the natural gas market regulated by FERC,

ultimately affects retail, end-use buyers. Plaintiffs' attorneys will have no trouble finding an economist who, for a fee, will gladly testify that the alleged industry practice in question—whether it be an accounting practice, shipping practice, or (as here) a price reporting practice)—impacts both wholesale and retail rates alike.

As here, a ready supply of potential plaintiffs will not prove difficult to find. Many large end-users of natural gas—including the Respondents in this case—purchase their gas directly from the interstate market, so as to eliminate the costs that accompany a middleman distributor. *See* Am. Petroleum Inst., *Understanding Natural Gas Markets* 19 (2006) ("[M]any industrial customers have the option to purchase natural gas from a marketer or producer instead of from the distribution company."). Once an entrepreneurial plaintiffs' attorney is successful in signing up direct purchasers like Respondents as clients, suddenly a state law claim that would have been preempted by a wholesale purchaser becomes *not* preempted under the Ninth Circuit's rule.

Armed with a suitable plaintiff and a plausible argument for affecting retail rates, the plaintiffs' bar will be able to use the Ninth Circuit's rule to wrest regulatory control away from FERC on matters as technical as how a natural gas wholesaler accounts for depreciation, how it allocates costs of capital expenditures, or how it hedges against financial risk. If a plaintiff can argue that any of these practices affect retail rates, even by merely affecting a natural gas company's cost structure, then the Ninth Circuit's rule will pave the way for the plaintiff to avoid preemption and impose state-

law duties on a federally regulated industry. That cannot possibly be the result that Congress intended.

Such technical regulatory issues are squarely within FERC's ambit, and only FERC has the required expertise and broad view of the market to regulate natural gas wholesalers intelligently and consistently. But if the Ninth Circuit's approach to preemption is allowed to stand, juries in state courts throughout the country will be empowered to decide whether any given practice—no matter how technical—is inappropriate and subject to liability.

For example, a business transaction that FERC rightly understands to be a bona fide financial hedge—the sort of hedge that American companies engage in every day for perfectly legitimate financial reasons—could now be deemed "manipulative" by a jury applying one of 50 different states' laws, resulting in massive liability for the natural gas company. Even worse, many of these suits are brought as class actions, where only a one-cent impact on each sale of natural gas can quickly add up to hundreds of millions of dollars in the hands of a sufficiently motivated plaintiffs' attorney and his experts.

Amicus WLF believes strongly that companies should not be put in a position where they cannot dependably rely on FERC's guidance about what they may and may not do. Nor should a single plaintiffs' lawyer be permitted to trump FERC by deciding whether nationwide practices affecting the wholesale market—practices routinely engaged in by all or most of the natural gas industry—are permissible. Absent discretionary review by this

Court, the Ninth Circuit's decision thus threatens to disrupt FERC's uniform regime by allowing attorneys motivated by large jury awards to create their own binding rules for the natural gas industry.

In any event, the Ninth Circuit's highly idiosyncratic approach to field preemption is unnecessary to combat truly anticompetitive practices. This Court has long recognized that the NGA authorizes *federal* antitrust suits challenging the allegedly anticompetitive practices of natural gas companies. *See, e.g., California v. FPC*, 369 U.S. 482 (1962). WLF believes that Respondents' state-law claims are motivated by a desire to take advantage of certain states' more liberal damages provisions, *see* Pet. 27-28, and to avoid the unifying force of this Court's antitrust doctrines, by taking refuge in often less well-developed and more plaintiff-friendly state court antitrust jurisprudence. While such state laws may garner much higher jury awards, and thus higher fees, for plaintiffs' attorneys, Congress has already determined that such laws are unnecessary to ensure a competitive market for interstate natural gas.

The natural gas industry has proven to be an economic boon throughout much of the country. If allowed to stand, the holding below will create vast uncertainty in the marketplace, potentially deterring industry stakeholders from investing hundreds of millions, if not billions, of dollars in resources into the natural gas market and serving as an unnecessary drag on the free enterprise system. Because the appeals court's decision below has significant nationwide implications, WLF respectfully urges this Court to grant the Petition

and settle, once and for all, the vitally important questions presented in this case.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the Petition.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

September 27, 2013

JOINT APPENDIX

No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX — VOLUME 1 OF 2

NEAL KUMAR KATYAL*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

ROBERT L. GEGIOS*
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Rd.
Milwaukee, W.I., 53212
(414) 962-5110
rgegios@kmksc.com

Counsel for Wisconsin Respondents

JENNIFER GILLE BACON*
POLSINELLI PC
900 West 48th Place
Suite 900
Kansas City, M.O. 64112
(816) 753-1000
jbacon@polsinelli.com

Counsel for Learjet Respondents

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

PETITION FOR CERTIORARI FILED AUGUST 26, 2013
CERTIORARI GRANTED JULY 1, 2014

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* * *

The appendix to the petition for certiorari contains the following material, which is omitted from the Joint Appendix:

A. Opinion of the United States Court of Appeals for the Ninth Circuit (April 10, 2013) 1a

B. Opinion of the United States District Court for the District of Nevada (July 18, 2011) 64a

C. Opinion of the United States District Court for the District of Nevada (November 2, 2009) 124a

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16821, 11-16869, 11-16876, 11-16880

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

DOCKET ENTRIES

Date	Entry	Description
7/25/2011	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 08/01/2011. Transcript ordered by 08/22/2011. Transcript due 09/20/2011. Appellant Learjet, Inc. and Appellant Topeka Unified School District 501 opening brief due 10/31/2011. Appellee AEP Energy Services, Inc., Appellee American Electric Power Company, Inc., Appellee CMS Energy Corporation, Appellee CMS Field Services, Appellee CMS Marketing Services & Trading Company, Appellee Coral Energy Resources, L.P., Appellee Duke

		Energy Corporation, Appellee Duke Energy Trading and Marketing, LLC, Appellee Dynegy Marketing and Trade, Appellee EL PASO MERCHANT ENERGY, L.P., Appellee El Paso Corporation, Appellee Oneok Energy Marketing & Trading Co., L.P., Appellee Oneok, Inc., Appellee Reliant Energy Services, Inc., Appellee Reliant Energy, Inc., Appellee The Williams Companies, Inc., Appellee Williams Energy Marketing & Trading Company, Appellee Williams Merchant Services Company, Inc., Appellee Xcel Energy, Inc. and Appellee ePrime, Inc. answering brief due 11/29/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7831710] (RT)
8/16/2011	5	Filed clerk order (Deputy Clerk: LBS): The court sua sponte consolidates nos. 11-16786, 11-16798, 11-16799, and 11-16897. The briefing schedule is adjusted as follows: the consolidated opening brief is due November 16, 2011; the consolidated answering brief is due December 16, 2011; and the

		optional consolidated reply brief is due within 14 days after service of the answering brief. Appellees' unopposed motion for this court to give the district court permission to correct its order and judgment is construed as a motion for a limited remand. So construed, the motion is denied prejudice to a renewed motion accompanied by a statement that the district court is willing to consider the proposed Fed. R. Civ. P.60(a) motion as required by FRAP 12.1. [7860416] [11-16786, 11-16798, 11-16799, 11-16897] (KKW)
8/24/2011	7	Filed clerk order (Deputy Clerk: CB): Nos. 11-16802, 11-16818, 11-16821, 11-16869, 11-16876 and 11-16880 are sua sponte consolidated with the previously consolidated appeals 11-16786, 11-16798, 11-16799 and 11-16897. The motions for leave to file Fed. R. Civ. P. 60(a) motions are denied without prejudice to a renewed motion stating that the district court is willing to consider the proposed Rule 60(a) motion. Fed. R. App. P. 12.1. The opening brief(s) shall be due November 16,

		2011. The answering brief(s) shall be due December 16, 2011. The optional reply brief(s) shall be due 14 days after service of the last-served answering brief. The parties are reminded of the court's preference for joint briefing. 9th Cir. R. 28-4. [7868730] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (KKW)
8/25/2011	9	Filed clerk order (Deputy Clerk: CB): The motion for reconsideration of the provisions of the August 24, 2011 order pertaining to the Federal Rule of Civil Procedure 60(a) motion is granted. The appeals are remanded on a limited basis nunc pro tunc pursuant to Federal Rule of Appellate Procedure 12.1, which effectuates the district court to act on the Rule 60(a) motion. The remaining provisions of the August 24, 2011 order continue to govern. [7871313] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (KKW)

11/30/2011	14	Submitted (ECF) Opening brief for review. Submitted by Appellants Learjet, Inc. and Topeka Unified School District 501 in 11-16786, Appellants Heartland Regional Medical Center, Northwest Missouri State University and Prime Tanning Corp. in 11-16798, Appellants BBD Acquisition Co. and Breckenridge Brewery of Colorado, LLC in 11-16799. Date of service: 11/30/2011. [7984236] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821]--[COURT UPDATE: Attached corrected brief. Filing spread to case numbers #11-16869, #11-16876, #11-16880, and #11-16897. Resent NDA. 12/02/2011 by GD] (JGB)
11/30/2011	15	Submitted (ECF) Opening brief for review. Submitted by Appellants Arandell Corporation, Briggs & Stratton Corporation, Carthage College, Ladish Co., Inc., Merrick's Inc. and Sargento Foods Inc. in 11-16869, Appellant NewPage Wisconsin System, Inc. in 11-16876, 11-16880. Date of service: 11/30/2011. [7984239] [11-16786, 11-16869, 11-16876,

		11-16880]--[Attached corrected brief. Filing spread to case numbers: 11-16798, 11-16799, 11-16802, 11-16818, 11-16821 and 11-16897. Resent NDA 12/02/2011 by GD] (RLG)
12/01/2011	18	Filed Appellants excerpts of record in 10 volumes. Volume 10 filed UNDER SEAL. Served on 11/30/2011. [7986528] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880] (WP)
12/02/2011	19	Filed clerk order: The opening brief [14] submitted by Learjet, Inc., et al., Heartland Regional Medical Center, et al., Brechenridge Brewery of Colorado, LLC, et al., Reorganized FLI, Inc., and Sinclair Oil Corporation is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7986618] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818,

		11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (RH)
12/02/2011	20	Filed clerk order: The opening brief [15] submitted by Wisconsin Appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7986701] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (RH)
02/03/2012	47	Submitted (ECF) Answering brief for review. Submitted by Appellees AEP Energy Services, Inc., American Electric Power Company, Inc., CMS Energy Corporation, CMS Field Services, CMS Marketing Services & Trading Company, Coral Energy Resources, L.P., Duke Energy Corporation, Duke Energy Trading and Marketing, LLC, Dynegy Marketing and Trade, EL PASO MERCHANT ENERGY, L.P., El Paso Corporation,

		Oneok Energy Marketing & Trading Co., L.P., Oneok, Inc., Reliant Energy Services, Inc., Reliant Energy, Inc., The Williams Companies, Inc., Williams Energy Marketing & Trading Company, Williams Merchant Services Company, Inc., Xcel Energy, Inc. and ePrime, Inc.. Date of service: 02/03/2012. [8056736]--[COURT UPDATE: Replaced PDF of brief. Spread filing to consolidated cases. Resent NDA. 02/12/2012 by TW] (MBG)
02/06/2012	48	Filed Appellees' joint supplemental excerpts of record on appeal in 3 volumes. [8059853] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (LA)
02/07/2012	49	Filed clerk order: The answering brief [47] submitted by Appellees is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version

		submitted electronically. Cover color: red. [8060487] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897]
03/06/2012	55	Submitted (ECF) Reply brief for review. Submitted by Appellants Learjet, Inc. and Topeka Unified School District 501 in 11-16786, Appellants Heartland Regional Medical Center, Northwest Missouri State University and Prime Tanning Corp. in 11-16798, Appellants BBD Acquisition Co. and Breckenridge Brewery of Colorado, LLC in 11-16799, Appellant Reorganized FLI, Inc. in 11-16802, Appellant Sinclair Oil Corporation in 11-16818, 11-16821. Date of service: 03/06/2012. [8093073] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821] -- [COURT UPDATE: Spread filing to case numbers: 11-16876; 11-16869; 11-16880; & 11-16897. REsent NDA. 03/06/2012 by DB] (WEQ)
03/06/2012	56	Submitted (ECF) Reply brief for review. Submitted by Appellants Arandell Corporation, Briggs & Stratton

		Corporation, Carthage College, Ladish Co., Inc., Merrick's Inc. and Sargento Foods Inc. in 11-16869, Appellant NewPage Wisconsin System, Inc. in 11-16876, Appellants Arandell Corporation, Briggs & Stratton Corporation, Carthage College, Ladish Co., Inc. and Merrick's Inc. in 11-16880. Date of service: 03/06/2012. [8093322] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (RLG)
03/07/2012	57	Filed clerk order: The reply brief [55] submitted by Learjet, Inc., et al., Heartland Regional Medical Center, et al., Breckenridge Brewery of Colorado, LLC, et al., Reorganized FLI, Inc., and Sinclair Oil Corporation is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of

		the brief created from the word processing application, not from PACER or Appellate ECF. [8093842] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (RH)
3/13/2012	61	Filed clerk order: The reply brief [56] submitted by Arandell Corporation, Briggs & Stratton Corporation, Carthage College, Ladish Co., Inc., Merrick's Inc., Sargento Foods Inc., and NewPage Wisconsin System, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8102024] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (RH)

10/19/2012	79	ARGUED AND SUBMITTED TO Judges CARLOS T. BEA, PAUL J. WATFORD and WILLIAM K. SESSIONS, III. [8369257] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897] (AT)
04/10/2013	82	FILED OPINION (CARLOS T. BEA, PAUL J. WATFORD and WILLIAM K. SESSIONS, III) The Plaintiffs have filed a Motion to Certify Question of Wisconsin State Law to the Wisconsin Supreme Court. Because we find that the plain text of Wisconsin Statutes § 133.14 is clear, we do not believe that certification is necessary as a "means to obtain authoritative answers to unclear questions of state law," and we therefore deny the motion. Toner v. Lederle Labs., Div. of Amer. Cyanamid Co., 779 F.2d 1429, 1432 (9th Cir. 1986). REVERSED IN PART; AFFIRMED IN PART; REMANDED. The parties shall bear their own costs on appeal. Judge: CTB Authoring, FILED AND ENTERED JUDGMENT. [8584032] [11-16786, 11-16798,

		11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880] (RP)
06/12/2013	93	Filed order (CARLOS T. BEA, PAUL J. WATFORD and WILLIAM K. SESSIONS, III) Appellees' joint motion for stay of mandate is hereby GRANTED. The mandate in the above-entitled actions are stayed for a period of 90 days from the date of this order. If during the period of the stay there is filed with the clerk of this Court a notice from the clerk of the United States Supreme Court that Appellees have filed a petition for writ of certiorari in that court, the stay shall continue until final disposition by the Supreme Court. [8664200] [11-16786, 11-16798, 11-16799, 11-16802, 11-16818, 11-16821, 11-16869, 11-16876, 11-16880, 11-16897]
08/29/2013	96	Received notice from the Supreme Court: petition for certiorari filed on 08/26/2013. Supreme Court Number 13-271. [8762298] [11-16786, 11-16798, 11-16802, 11-16818, 11-16869, 11-16876] (RR)

07/03/2014	102	Received notice from the Supreme Court. Petition for certiorari GRANTED on 07/01/2014. Supreme Court Number 13-271. [9155841] [11-16786, 11-16798, 11-16802, 11-16818, 11-16869, 11-16876] (RR)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:03-CV-01431-PMP-PAL

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

DOCKET ENTRIES

Date	Entry	Description
11/14/2003	3	ORDER (cc) frm MDL Panel TRANSFER ORD Transfer of actn listed of Sched A and pndng in East Dist of CA is DENIED. Purs to 28:1407, remaining actns listed on Sched A are transferred to Dist of NV, assigned to PMP for coordinated/consolidated pretrial procee (Entered: 11/24/2003)
7/27/2007	548	ORDER (copy of order from case 2:05cv1331-PMP-PAL: Motion #57 to amend judgment is granted; Order #53 on Motion to Dismiss is Vacated; Request for Judicial Notice 65 is Denied; Motion 62 for Discovery is Denied. Answer to amended complaint due within 30 days) Signed by Judge Philip M. Pro on 7/27/07.

		(Copies have been distributed pursuant to the NEF - AXM) (Entered: 07/27/2007)
11/30/2007	764	Joint MOTION for Summary Judgment by Defendants Coral Energy Resources, LP, Western Gas Resources, Inc., Duke Energy Trading & Marketing, LLC, Dynegy Marketing & Trade, Xcel Energy Inc.. Responses due by 12/18/2007. (Tribble, Douglas) (Entered: 11/30/2007)
11/30/2007	765	MEMORANDUM filed by Defendant Duke Energy Trading & Marketing, LLC re 764 Joint MOTION for Summary Judgment. (Tribble, Douglas) (Entered: 11/30/2007)
05/14/2008	1025	ORDER: Defendants' 764 Joint Motion for Summary Judgment is Denied. Defendants Reliant Energy Services, Inc., The Williams Companies, Inc., Williams Merchant Services Company, Inc., Williams Power Company, Inc., Oneok, Inc., and Oneok Energy Services Company, L.P.'s Joinder in Defendants' 816 Joint Motion for Summary Judgment is Denied. El Paso's Joinder in

		Defendants' 827 Motion for Summary Judgment is Denied. Plaintiffs' Joint Motion for Discovery and Continuance of Decision is Denied. Signed by Judge Philip M. Pro on 05/14/08. (Copies have been distributed pursuant to the NEF - SRK) (Entered: 05/15/2008)
07/18/2008	1248	MOTION for District Judge to Reconsider Order re 1025 Order on Motion for Summary Judgment,,,,,, DEFENDANTS' MOTION FOR RECONSIDERATION OF MAY 14, 2008 ORDER OR, IN THE ALTERNATIVE, CERTIFICATION FOR INTERLOCUTORY APPEAL by Defendant Dynegy Marketing & Trade. Responses due by 8/5/2008. (Tribble, Douglas) (Entered: 07/18/2008)
11/02/2009	1844	ORDER GRANTING Defendants' 1248 Motion for District Judge to Reconsider 5/14/08 Order. Defendants shall re-file their Motion for Summary Judgment along with any supplementation no later than 11/24/09. Signed by Judge Philip M. Pro on 11/2/09.

		(Copies have been distributed pursuant to the NEF - ECS) (Entered: 11/02/2009)
11/03/2009	1846	AMENDED COMPLAINT Third Amended Complaint with Jury Demand against Xcel Energy Inc., Northern States Power Company, AEP Energy Services, Inc., American Electric Power Company, Inc., Cantera Gas Company, Centerpoint Energy Services, Inc., Duke Energy Carolinas, LLC, Duke Energy Trading & Marketing, LLC, E Prime Inc, El Paso Corporation, El Paso Marketing LP, Reliant Energy, Inc., Reliant Energy Services, Coral Energy Resources, LP, OneOK Energy Services Company, L.P., Dynegy Marketing & Trade, Oneok, Inc., Williams Companies, Inc., CMS Energy, Dynegy GP Inc., CMS Energy Resource Management Company, Dynegy Illinois Inc., DMT G.Pg. LLC, Williams Merchant Services Company, Inc., Williams Power, filed by Arandell Corp., Merrick's Inc., Sargento Foods, Inc., Ladish Co., Inc., Carthage College,

		Briggs and Stratton Corporation. Adds and removes parties. Proof of service due by 3/3/2010.(Fischer, William) (Entered: 11/03/2009)
11/17/2009	1857	AMENDED COMPLAINT with Jury Demand against American Electric Power Company, Inc., El Paso Merchant Energy, L.P., Reliant Energy, Inc., Duke Energy Corporation, Duke Energy Trading and Marketing, L.L.C., CMS Field Services, Coral Energy Resources, LP, Kansas Gas Marketing Company, Dynegy Marketing & Trade, Oneok Energy Marketing & Trading Company, LP, Oneok, Inc., Williams Companies, Inc., Williams Energy Marketing & Trading Company, CMS Marketing Services & Trading Company, CMS Energy, Xcel Energy Inc., AEP Energy Services, Inc., E Prime Inc, El Paso Corporation, Reliant Energy Services, Williams Merchant Services Company, Inc., filed by Learjet, Inc., Topeka Unified School District 501. Removes parties. Proof of service due by

		3/17/2010.(Bacon, Jennifer) (Entered: 11/17/2009)
11/19/2009	1863	AMENDED COMPLAINT with Jury Demand against American Electric Power Company, Inc., Duke Energy Corporation, Reliant Energy, Inc., CMS Field Services, Coral Energy Resources, LP, Kansas Gas Marketing Company, Dynegy Marketing & Trade, Oneok Energy Marketing & Trading Company, LP, Oneok, Inc., Williams Companies, Inc., Williams Energy Marketing & Trading Company, CMS Marketing Services & Trading Company, CMS Energy, Xcel Energy Inc., AEP Energy Services, Inc., E Prime Inc, El Paso Corporation, Reliant Energy Services, El Paso Merchant Energy, L.P., Duke Energy Trading and Marketing, L.L.C., Williams Merchant Services Company, Inc., filed by Heartland Regional Medical Center, Prime Tanning Corporation, Northwest Missouri State University. Adds new parties. Proof of service due by 3/19/2010.(Bacon, Jennifer)

		(Entered: 11/19/2009)
12/16/2009	1880	Joint MOTION for Summary Judgment by Defendant Coral Energy Resources, LP. Responses due by 1/2/2010. (Manuel, Roxanna) (Entered: 12/16/2009)
12/16/2009	1881	STATEMENT of UNDISPUTED MATERIAL FACTS re 1880 Joint MOTION for Summary Judgment ; BASED ON FEDERAL PREEMPTION by Defendant Coral Energy Resources, LP. (Manuel, Roxanna) (Entered: 12/16/2009)
12/16/2009	1882	APPENDIX IN SUPPORT to 1880 Joint MOTION for Summary Judgment ; filed by Defendant Coral Energy Resources, LP. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2-3, # 3 Exhibit 3-A, # 4 Exhibit 4, # 5 Exhibit 4-A thru 4-D, # 6 Exhibit 5-6, # 7 Exhibit 6-A thru 6-D, # 8 Exhibit 7 thru 7-B, # 9 Exhibit 8 thru 8-J, # 10 Exhibit 9 thru 9-C, # 11 Exhibit 9-D, # 12 Exhibit 10-15, # 13 Exhibit 15-A thru 17, # 14 Exhibit 18, # 15 Exhibit 18-A, # 16 Exhibit 19-23, # 17 Exhibit

		24 thru 25-B, # 18 Exhibit 26, # 19 Exhibit 27, # 20 Exhibit 28, # 21 Exhibit 29-30, # 22 Exhibit 31-32, # 23 Exhibit 33, # 24 Exhibit 34, # 25 Exhibit 35, # 26 Exhibit 36, # 27 Exhibit 37, # 28 Exhibit 38, # 29 Exhibit 39, # 30 Exhibit 40, # 31 Exhibit 41, # 32 Exhibit 42, # 33 Exhibit 43-49, # 34 Exhibit 50-52) (Manuel, Roxanna) (Entered: 12/16/2009)
12/16/2009	1884	MOTION for Partial Summary Judgment Based on Federal Preemption by Defendants E Prime Inc, Xcel Energy Inc.. Responses due by 1/2/2010. (Miguel, Michael) (Entered: 12/16/2009)
12/16/2009	1885	STATEMENT of Undisputed Material Facts re 1884 MOTION for Partial Summary Judgment Based on Federal Preemption ; by Defendants E Prime Inc, Xcel Energy Inc.. (Miguel, Michael) (Entered: 12/16/2009)
01/14/2010	1891	MOTION for Partial Summary Judgment ~~MEMORANDUM~~ filed by Defendants Dynegy Inc., Dynegy Marketing & Trade re 1890 NOTICE of

		MOTION for Summary Judgment . (Tribble, Douglas) Event type corrected on 1/19/2010 (SRK). (Entered: 01/14/2010)
1/14/2010	1892	STATEMENT of Undisputed Material Facts in Support of 1891 Motion for Partial Summary Judgment re 1890 NOTICE of MOTION for Summary Judgment ; by Defendants Dynegy Inc., Dynegy Marketing & Trade. (Tribble, Douglas) Modified text on 1/19/2010 (SRK). (Entered: 01/14/2010)
1/14/2010	1893	APPENDIX in Support of 1891 MOTION for Partial Summary Judgment ; filed by Defendants Dynegy Inc., Dynegy Marketing & Trade. (Attachments: # 1 Exhibit Exhibits 1 through 4, # 2 Exhibit Exhibit 5, # 3 Exhibit Exhibit 6, # 4 Exhibit Exhibit 7, # 5 Exhibit Exhibit 8 and 9, # 6 Exhibit Exhibit 10, # 7 Exhibit Exhibit 11)(Tribble, Douglas) Modified text on 1/19/2010 (SRK). (Entered: 01/14/2010)
05/26/2011	1944	MOTION for Partial Summary Judgment by Defendant

		OneOK Energy Services Company, L.P.. Responses due by 6/12/2010. (Fitzgerald, Craig) (Entered: 05/26/2010)
07/02/2010	1952	AMENDED COMPLAINT with Jury Demand against CMS Energy Corporation, CMS Energy Resource Management Company, Cantera Gas Company, Centerpoint Energy Services, Inc., Coral Energy Resources, LP, DMT G.Pg. LLC, Duke Energy & Marketing, LLC, Dynegy GP Inc., Dynegy Illinois Inc., Dynegy Marketing & Trade, E Prime Inc, El Paso Corporation, El Paso Marketing LP, Northern States Power Company, OneOK Energy Services Company, L.P., Oneok, Inc., Reliant Energy Services, Inc., Williams Companies, Inc., Williams Merchant Services Company, Inc., Williams Power Company, Inc., Xcel Energy Inc., filed by NewPage Wisconsin System Inc.. No changes to parties. Proof of service due by 10/30/2010. (Attachments: # 1 Certificate of Service Certificate of Service)(Fischer, William) 1953

		Corrected image filed on 7/7/2010. (MJZ) (Entered: 07/02/2010)
07/18/2011	1972	ORDER that Defendants Joint Renewed Motion and Motion for Summary Judgment 1880 is GRANTED in part and DENIED in part. The ePrime Defendants Notice of Motion and Motion for Partial Summary Judgment Based on Preemption 1884 is GRANTED. Dynegy Inc. and Dynegy Marketing and Trades Motion for Partial Summary Judgment 1891 is GRANTED. ONEOK Energy Services Companys Motion for Partial Summary Judgment 1944 is GRANTED. Plaintiffs Motion for Class Certification 1383 and Plaintiffs Motion for Class Certification 1394 are DENIED as moot. To the extent this Order results in judgment against fewer than all Defendants and/or judgment on fewer than all claims in any of the above actions, the Court directs final judgment be entered on the above-identified claims for the above-identified Defendants, as no just reason

		for delay exists. The stay imposed by the Order Re: Stay of Certain Proceedings 1942 is hereby lifted. The parties shall file any supplemental briefs regarding the various remaining pending motions for class certification on or before August 18, 2011. Signed by Judge Philip M. Pro on 7/18/11. (Copies have been distributed pursuant to the NEF - ECS) (Entered: 07/18/2011)
7/22/2011	1974	NOTICE OF APPEAL as to 1973 Clerk's Judgment by Plaintiffs Learjet, Inc., Topeka Unified School District 501. Filing fee $ 455, receipt number 0978-2060956. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Bacon, Jennifer) (Entered: 07/22/2011)
07/22/2011	1975	NOTICE OF APPEAL as to 1973 Clerk's Judgment by Plaintiffs Heartland Regional Medical Center, Northwest Missouri State University, Prime Tanning Corporation. Filing fee $ 455, receipt number 0978-2060971. E-mail notice

		(NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Bacon, Jennifer) (Entered: 07/22/2011)
07/22/2011	1976	NOTICE OF APPEAL as to 1973 Clerk's Judgment by Plaintiffs BBD Acquisition Co., Breckenridge Brewery of Colorado, LLC. Filing fee $ 455, receipt number 0978-2060985. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Bacon, Jennifer) (Entered: 07/22/2011)
07/22/2011	1977	NOTICE OF APPEAL as to 1973 Clerk's Judgment by Plaintiff Reorganized FLI, Inc.. Filing fee $ 455, receipt number 0978-2061068. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (McCallister, Gary) (Entered: 07/22/2011)
07/27/2011	1989	NOTICE OF APPEAL as to 1973 Clerk's Judgment, 1972 Order on Motion to Certify

		Class,,,,,,,,,, Order on Motion for Summary Judgment,,,,,, Order on Motion for Partial Summary Judgment,,,,,,,,,,,,,,,,,,,, Add and Terminate Parties,,,, by Plaintiff Sinclair Oil Corporation. Filing fee $ 455, receipt number 0978-2065024. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Ballif, Philip) (Entered: 07/27/2011)
07/27/2011	1990	NOTICE OF APPEAL as to 1973 Clerk's Judgment, 1972 Order on Motion to Certify Class,,,,,,,,,, Order on Motion for Summary Judgment,,,,,, Order on Motion for Partial Summary Judgment,,,,,,,,,,,,,,,,,,,, Add and Terminate Parties,,,, by Plaintiff Sinclair Oil Corporation. Filing fee $ 455, receipt number 0978-2065044. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Ballif, Philip) (Entered: 07/27/2011)

08/03/2011	2044	NOTICE OF APPEAL as to 1973 Clerk's Judgment by Plaintiffs Arandell Corp., Ladish Co., Inc., Merrick's Inc., Sargento Foods, Inc., Consol Plaintiffs Briggs and Stratton Corporation, Carthage College. Filing fee $ 455, receipt number 0978-2072649. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Gegios, Robert) (Entered: 08/03/2011)
08/03/2011	2045	NOTICE OF APPEAL as to 1973 Clerk's Judgment by Plaintiff NewPage Wisconsin System Inc.. Filing fee $ 455, receipt number 0978-2072666. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Gegios, Robert) (Entered: 08/03/2011)
08/03/2011	2046	NOTICE OF APPEAL by Plaintiffs Arandell Corp., Ladish Co., Inc., Merrick's Inc., Sargento Foods, Inc., Consol Plaintiffs Briggs and Stratton Corporation, Carthage College.

		Filing fee $ 455, receipt number 0978-2072676. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Statement) (Gegios, Robert) (Entered: 08/03/2011)
08/08/2011	2059	NOTICE OF APPEAL as to 1973 Clerk's Judgment, 1972 Order on Motion to Certify Class,,,,,,,,,, Order on Motion for Summary Judgment,,,,,, Order on Motion for Partial Summary Judgment,,,,,,,,,,,,,,,,,,,, Add and Terminate Parties,,,, by Plaintiff Multiut Corporation. Filing fee $ 455, receipt number 0978-2076446. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # 1 Representation Agreement) (Mandel, Alan) (Entered: 08/08/2011)
08/18/2011	2074	AMENDED JUDGMENT. Signed by Clerk of Court, Lance S. Wilson on 8/18/11. (Copies have been distributed pursuant to the NEF - ECS) (Entered: 08/18/2011)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re: Western States Wholesale Natural Gas Antitrust Litigation

JUDGMENT IN A CIVIL CASE

Case Number: 2:03-CV-1431 PMP-PAL

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

Defendants' Joint Renewed Motion and Motion for Summary Judgment (Doc. #1880) is hereby GRANTED in part and DENIED in part as follows:

- In Learjet, et al. v. ONEOK, Inc., et al., 2:06-CV-00233-PMP-PAL, all of Plaintiff's claims in the Second Amended Complaint (Doc. #1857) are hereby dismissed as preempted against the following Defendants: ONEOK, Inc.; ONEOK Energy Marketing & Trading Co., L.P.; The Williams Companies, Inc.; Williams Merchant Services Company, Inc.; Williams Energy Marketing & Trading; American Electric Power Company, Inc.;

AEP Energy Services, Inc.; Duke Energy Trading and Marketing, L.L.C.; Dynegy Marketing & Trade; El Paso Corporation; El Paso Merchant Energy, L.P.; CMS Marketing Services & Trading Company; CMS Field Services; Reliant Energy Services, Inc.; Coral Energy Resources, L.P.; Xcel Energy, Inc.; ePrime, Inc.

- In Heartland Regional Medical Center, et al. v. ONEOK, Inc., et al., 2:07-CV-00987-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #1863) are hereby dismissed as preempted against the following Defendants: ONEOK, Inc.; ONEOK Energy Marketing & Trading Co., L.P.; The Williams Companies, Inc.; Williams Merchant Services Company, Inc.; Williams Energy Marketing & Trading; Duke Energy Trading and Marketing, L.L.C.; Dynegy Marketing & Trade; El Paso Corporation; El Paso Merchant Energy, L.P.; CMS Marketing Services & Trading Company; CMS Field Services; Reliant Energy Services, Inc.; Coral Energy Resources, L.P.; Xcel Energy, Inc.; ePrime, Inc.

- In Breckenridge Brewery of Colorado, LLC, et al. v. ONEOK, Inc., et al., 2:06-cv-01351-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #717) are hereby dismissed as preempted against the following Defendants: Xcel Energy, Inc.; ePrime Energy Marketing, Inc.

- In Reorganized FLI, Inc. v. Williams Companies Inc., et al., 2:05-CV-01331-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #11 in 2:05-CV-01331-PMP-PAL) are hereby dismissed as preempted against the following

Defendants: ONEOK, Inc.; ONEOK Energy Marketing & Trading Co., L.P.; The Williams Companies, Inc.; Williams Merchant Services Company, Inc.; Williams Energy Marketing & Trading; American Electric Power Company, Inc.; AEP Energy Services, Inc.; Duke Energy Trading and Marketing, L.L.C.; Dynegy Marketing & Trade; El Paso Corporation; El Paso Merchant Energy, L.P.; CMS Marketing Services & Trading Company; CMS Field Services, Inc.; Reliant Energy Services, Inc.; Coral Energy Resources, L.P.; Xcel Energy, Inc.; ePrime, Inc.

- In Arandell Corp., et al. v. Xcel Energy, Inc., et al., 2:07-CV-01019-PMP-PAL, all of Plaintiff's claims in the Corrected Second Amended Complaint (Doc. # 190 in 2:07-CV-01019-PMP-PAL) are hereby dismissed as preempted against the following Defendants: Xcel Energy, Inc.; Northern States Power Company; CMS Energy Resources Management Company (f/k/a CMS Marketing Services and Trading Company); Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, L.L.C.; Dynegy Illinois Inc.; DMT G.P. L.L.C.; Dynegy GP Inc.; Dynegy Marketing and Trade; ePrime, Inc.; El Paso Corporation; El Paso Merchant Energy, L.P.; ONEOK, Inc.; ONEOK Energy Services Company L.P. (f/k/a ONEOK Energy Marketing and Trading Company, L.P.); Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Power Company, Inc. (Williams Energy Marketing & Trading); Williams Merchant Services Company, Inc.

- In Arandell Corp., et al. v. CMS Energy Corp., et al., 2:09-CV-01103-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #10-2 in 2:09-CV-01103-PMP-PAL) are hereby dismissed as preempted against the following Defendants: CMS Energy Corporation; CMS Energy Resources Management Company (f/k/a CMS Marketing Services and Trading Company); Cantera Gas Company, LLC (f/k/a CMS Field Services, Inc.).

- In NewPage Wisconsin System, Inc. v. CMS Energy Resource Management Co., et al., 2:09-CV-00915-PMP-PAL, all of Plaintiff's claims in the Amended Complaint (Doc. #1952) are hereby dismissed as preempted against the following Defendants: CMS Energy Resources Management Company (f/k/a CMS Marketing Services and Trading Company); Xcel Energy, Inc.; Northern States Power Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, L.L.C.; Dynegy Illinois Inc.; DMT G.P. L.L.C.; Dynegy GP Inc.; Dynegy Marketing and Trade; ePrime, Inc.; El Paso Corporation; El Paso Marketing, L.P.; ONEOK, Inc.; ONEOK Energy Services Company L.P. (f/k/a ONEOK Energy Marketing and Trading Company, L.P.); Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Power Company, Inc. (Williams Energy Marketing & Trading); Williams Merchant Services Company, Inc.

The motion is DENIED as to the remaining Defendant in Learjet, et al. v. ONEOK, Inc., et al., and Heartland Regional Medical Center, et al. v. ONEOK, Inc., et al., 2:07-CV-00987-PMP-PAL, Defendant Kansas Gas Marketing Company.

The ePrime Defendants' Notice of Motion and Motion for Partial Summary Judgment Based on Preemption (Doc. #1884) is hereby GRANTED as follows:

- In Sinclair Oil Corporation v. e-Prime, Inc. & Xcel Energy Inc., 2:06-CV-00267-PMP-PAL, counts 3 through 11 of Plaintiff's Complaint (Doc. #1 in 2:06-CV-00267-PMP-PAL) are hereby dismissed as preempted against the following Defendants: Xcel Energy, Inc.; ePrime, Inc.

Dynegy Inc. and Dynegy Marketing and Trade's Motion for Partial Summary Judgment (Doc. #1891) is hereby GRANTED as follows:

- In Multiut Corporation v. Dynegy, Inc., et al., 2:05-CV-01300-PMP-PAL, counts 2 and 3 of Plaintiffs Complaint (Doc. #1 in 2:05-CV-01300-PMP-PAL) are hereby dismissed as preempted against the following Defendants: Dynegy, Inc.; Dynegy Marketing and Trade.

ONEOK Energy Services Company's Motion for Partial Summary Judgment (Doc. #1944) is hereby GRANTED as follows:

- In Sinclair Oil Corporation v. OneOK Energy Services Company, L.P., 2:06-CV-00282-PMP-PAL, counts 1-6, 8, and 10 of Plaintiff's claims in the Complaint (Doc. #1 in 2:06-CV-00282-PMP-PAL) are hereby dismissed as preempted against the following Defendants: ONEOK Energy Services Company, L.P.

Plaintiffs' Motion for Class Certification (Doc. #1383) and Plaintiffs' Motion for Class Certification (Doc. #1394) are hereby DENIED as moot.

To the extent this Order results in judgment against fewer than all Defendants and/or judgment on fewer than all claims in any of the above actions, the Court directs final judgment be entered on the above-identified claims for the above-identified Defendants, as no just reason for delay exists.

LANCE S. WILSON
CLERK

August 18, 2011 Las Vegas NV
DATE

/s/ Lance S. Wilson
(By) DEPTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL 1566

Case No.
2:03-CV-01431-PM-PAL
BASE FILE

IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

Case No.
2:05-CV-01331-PM-PAL

J.P. MORGAN TRUST COMPANY,
NATIONAL ASSOCIATION, in its
Capacity as Trustee of FLI Liquidating Trust,

Plaintiff,

v.

THE WILLIAMS COMPANIES, INC., et al.,

Defendants.

Case No.
2:06-CV-00233-PMP PAL

EARJET, INC., et al.,

Plaintiffs,

v.

ONEOK, INC., et al.

Defendants.

ORDER

Presently before this Court is Defendants' Joint Motion for Summary Judgment (Doc. #764);[1] Doc. #108 in 2:05-CV-01331-PMP-PAL; Doc. #135 in 2:06-CV-00233-PMP-PAL), with a separate memorandum filed by Defendant Duke Energy Trading and Marketing, L.L.C. (Doc. #765), and statements of undisputed material facts and supporting declarations (Doc. ##766-771), filed on November 30, 2007. Also before the Court is Defendants Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Merchant Services Company, Inc.; Williams Power Company, Inc.; Oneok, Inc.; and Oneok Energy Services Company, L.P.'s Joinder in Defendants' Joint Motion for Summary Judgment (Doc. #816; Doc. #119 in 2:05-CV-01331-PMP-PAL;

[1] Document numbers reference the base file, 2:03-CV-01431-PMP-PAL, unless otherwise noted.

Doc. #147 in 2:06-CV-00233-PMP-PAL), with supporting memoranda, statements of undisputed facts, and declarations (Doc. #817-824), filed on January 7, 2008. Also before the Court is El Paso's Joinder in Defendants' Motion for Summary Judgment (Doc. #827; Doc. #125 in 2:05-CV-01331-PMP-PAL; Doc. #154 in 2:06-CV-00233-PMP-PAL) with supporting statement of undisputed facts (Doc. #828), filed on January 11, 2008.

Plaintiffs filed an Opposition (Doc. #129 in 2:05-CV-01331-PMP-PAL; Doc. #157 in 2:06-CV-00233-PMP-PAL) with supporting response to the statements of undisputed facts (Doc. #130 in 2:05-CV-01331-PMP-PAL; Doc. #158 in 2:06-CV-00233-PMP-PAL), and Joint Motion for Discovery and Continuance of Decision Pursuant to FRCP 56(e)(1) and (f) (Doc. #131/132 in 2:05-CV-01331-PMP-PAL; Doc. #159/160 in 2:06-CV-00233-PMP-PAL), filed on January 25, 2008. Defendants filed Replies (Doc. #852, #853) with supporting statements of undisputed facts and declarations (Doc. #851, #853, #855, #856, #857, #858, #860) on February 20, 2008. That same day, Defendants also filed an Opposition to Plaintiffs' motion for discovery (Doc. #859). Plaintiffs did not file a reply.

I. BACKGROUND

This case is one of many in consolidated Multidistrict Litigation arising out of the energy crisis of 2000-2001. Plaintiffs allege Defendants conspired to engage in anti-competitive activities with the intent to manipulate and artificially increase the price of natural gas for consumers. Specifically, Plaintiff alleges Defendants, directly

and through their affiliates, conspired to manipulate the natural gas market by knowingly delivering false reports concerning trade information to trade indices and engaging in wash trades, which conduct violated Kansas Statutes Annotated § 50-101, et. seq.

Defendants previously moved to dismiss Plaintiffs' Complaints, arguing the Natural Gas Act ("NGA") preempted Plaintiffs' claims under the doctrines of field and conflict preemption. In separate Orders, the Court suggested FERC's exclusive jurisdiction over the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales, may preempt Plaintiffs' state law antitrust claims. (Order [Doc. #448] at 6-16; Order [Doc. #547] at 6-11.) In J.P. Morgan, the Court dismissed Plaintiffs' claims as preempted on the belief that Plaintiffs conceded Defendants participated in the interstate natural gas market and FERC therefore had exclusive jurisdiction over Defendants' alleged misconduct in the wholesale natural gas market. (Order [Doc. #448] at 15-16.) The Court later reconsidered this ruling based on Plaintiffs' clarification that in fact they did not concede the factual question of Defendants' participation in the interstate market during the relevant time period. (Order [Doc. #548] at 4-9.) In Learjet, the Court ruled that FERC's exclusive jurisdiction may preempt Plaintiffs' claims but it was not clear from the face of the Amended Complaint that Defendants engaged in jurisdictional sales during the relevant time period, and, on a motion to dismiss, the Court

had to construe the Amended Complaint in Plaintiffs' favor. (Order [Doc. #547] at 12-25.)

Defendants Duke Energy Trading and Marketing Company, L.L.C.; Dynegy Marketing and Trade; Coral Energy Resources, L.P.; Xcel Energy, Inc.; e-prime, Inc., and Western Gas Resources, Inc. now move for summary judgment, contending Plaintiffs' claims against them are federally preempted under the doctrines of field and conflict preemption. Defendants rely on this Court's previous Orders indicating federal preemption would bar Plaintiffs' claims if Defendants are natural gas companies engaged in sales for resale within FERC's jurisdiction. Specifically, Defendants note that in the Court's prior Order in Learjet, the Court stated that "[i]f Defendants engaged in jurisdictional sales during the relevant time period, even if those sales were not to Plaintiffs, FERC has jurisdiction over Defendants and their alleged misconduct." (Order [Doc. #547] at 21.) Defendants now come forward with evidence they engaged in jurisdictional sales during the relevant time period identified in the Complaints. Defendants therefore argue they are entitled to summary judgment because they are natural gas companies subject to FERC's exclusive jurisdiction during the relevant time period, and consequently, Plaintiffs' claims are preempted.

Plaintiffs respond preemption does not bar their claims because their claims are based on transactions which do not fall within FERC's exclusive jurisdiction. Plaintiffs contend the United States Court of Appeals for the Ninth Circuit's

decisions in related Multidistrict Litigation cases,[2] issued after this Court's preemption Orders, require the Court to take a transactional view to determine whether claims are preempted. Plaintiffs argue that because their claims are based on non-jurisdictional sales, federal preemption does not apply.

II. LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" demonstrate "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The substantive law defines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000). The burden then shifts to the non-moving party to go beyond the pleadings and set forth specific facts demonstrating there is a genuine issue for trial. Id.;

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[2] See E & J Gallo Winery v. Encana Corp., 503 F.3d 1027 (9th Cir. 2007); Sierra Pac. Res. v. El Paso Corp., Slip Copy, No. 05-15127, 2007 WL 2753048 (9th Cir. Sept. 21, 2007) (unpublished); Texas-Ohio Energy, Inc. v. AEP Energy Serv., Inc., et al., Slip Copy, No. 05-15919, 2007 WL 2806331 (9th Cir. Sept. 24, 2007) (unpublished).

Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001).

III. DISCUSSION

"Federal preemption of state law is rooted in the Supremacy Clause, Article VI, clause 2, of the United States Constitution." Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 928 (9th Cir. 2002). Whether federal law preempts state law is a matter of congressional intent. Fidelity Fed. Say. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152-53 (1982). Generally, there are three situations in which state law must yield to federal law. First, federal law preempts state law when Congress expressly so provides. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). Next, under the doctrine of field preemption, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Finally, under the doctrine of conflict preemption, even "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id. (internal citations omitted).

The NGA does not contain an express provision preempting state law. Consequently, express preemption does not apply. As for implied preemption, when Congress evidences an intent to occupy "a given field or an identifiable portion of

it . . ., the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)). "The metaphor 'occupy the field' is strongly associated with, and often taken to automatically entail, exclusive federal control." In re Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d 1072, 1082 (S.D. Cal. 2003) (citing Public Util. Comm'n of Cal. v. FERC, 900 F.2d 269, 274 (D.C. Cir. 1990)).

In the context of natural gas, Congress intended to create an effective and comprehensive dual regulatory scheme that recognized the states' authority to regulate certain natural gas transactions as well as the federal government's authority over interstate commerce. Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 520-21 (1947). Through the NGA, Congress granted to FERC jurisdiction over matters relating to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales. 15 U.S.C. § 717(b); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 305 (1988). Where Congress has granted FERC jurisdiction, "that jurisdiction is exclusive." In re Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d at 1076; Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 377 (1988) (Scalia, J. concurring) (stating "it is common ground that if FERC has jurisdiction over a subject, the

States cannot have jurisdiction over the same subject"); Public Util. Comm'n of Cal., 900 F.2d at 274 (explaining that "if there be [FERC] jurisdiction over some component of the transaction, it is exclusive over that component"). Accordingly, "[t]he 'bright line' division of authority adopted by Congress precludes any attempt to inject state law into areas reserved to FERC." In re Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d at 1076.

Although where FERC's jurisdiction exists it is exclusive, FERC must be acting within its statutorily prescribed sphere of control to preempt state law. FERC, as a federal agency, " 'literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.' " New York v. F.E.R.C., 535 U.S. 1, 18 (2002) (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)). Congress carved out from FERC's jurisdiction and left the states to regulate "any other transportation or sale of natural gas or . . . the local distribution of natural gas or . . . the facilities used for such distribution or . . . the production or gathering of natural gas." 15 U.S.C. § 717(b). Additionally, Congress removed "first sales"[3] from FERC's rate-setting jurisdiction. Natural Gas

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[3] "[F]irst sales are, in essence, merely sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution company, or retail customer. In other words, sales by pipelines, local distribution companies, and their affiliates cannot be first sales unless these entities are selling gas of their own production." E. & J. Gallo Winery, 503 F.3d at 1037 (citing 15 U.S.C. § 3301(21)(B)).

Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989); E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1037 (9th Cir. 2007).

Under this dual regulatory scheme, where FERC has jurisdiction, it is exclusive and preempts state law under field and conflict preemption principles. See Order [Doc. #547] at 14-21; Schneidewind, 485 U.S. at 300-01; Ill. Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498, 507 n.1 (1942) (stating that Congress intended for the NGA "to occupy th[e] field" of wholesale sales in interstate commerce). To the extent a plaintiff attempts to bring an antitrust claim under Kansas state law that falls within FERC's exclusive jurisdiction, such a claim is preempted. (Order [Doc. #547] at 14-21.) However, FERC's exclusive jurisdiction, and hence its preemptive force, is limited to those areas delineated in the statute, and does not extend to those areas Congress expressly removed from FERC's purview. Ill. Natural Gas Co., 314 U.S. at 507 (noting the NGA "is restricted in its application" to the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and to natural gas companies engaged in such transportation or sale); see also Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind., 332 U.S. 507, 520 (1947) ("We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. . . . The scheme was one of co-operative action between federal and state agencies." (footnote omitted)).

Due to this dual regulatory scheme, "[i]t is inevitable that jurisdictional tensions [will] arise as a result of the fact that [state and federally regulated elements coexist within] a single integrated system . . . ." Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 515 (1989) (quotation and internal citation omitted). Treating every instance of jurisdictional tension as preempting state regulation would "thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish in § 1(b), and would render Congress' specific grant of power to the States to regulate production virtually meaningless." Id. Accordingly, the United States Supreme Court has instructed courts to apply conflict preemption "sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." Id.

Plaintiffs' state law antitrust claims assert Defendants engaged in anticompetitive misconduct, including wash trades and manipulative price reporting, which affected the price Plaintiffs had to pay in first or retail sales for natural gas. Plaintiffs contend that because the transactions in which Plaintiffs purchased the natural gas are first or retail sales, which are outside FERC's jurisdiction, the NGA does not preempt their claims. Defendants argue that because Defendants engaged in jurisdictional sales during the relevant time period, they are natural gas companies as defined under the NGA, and FERC has exclusive jurisdiction over their alleged misconduct.

As a result of various changes in the natural gas industry, including Congressional legislation aimed at deregulation, FERC decided, pursuant to its authority under section seven of the NGA, to issue blanket certificates allowing pipelines and other persons selling natural gas to make wholesale sales at negotiated or market-based rates. Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at ¶ 7 (2003), rehearing denied, 107 F.E.R.C. ¶ 61,174 (2004); 18 C.F.R. § 284.402(a). The purpose of the blanket certificates was to "foster a truly competitive market for natural gas sales for resale in interstate commerce, giving purchasers of natural gas access to multiple sources of natural gas and the opportunity to make gas purchasing decisions in accord with market conditions." In re Amendments to Blanket Sales Certificates, 107 F.E.R.C. ¶ 61,174, at ¶ 12 (2004) (internal quotation omitted). These "blanket certificates were issued by operation of the rule itself and there was no requirement for persons to file applications seeking such authorization." Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at ¶ 11.

FERC's issuance "of certificate authority to make jurisdictional sales of natural gas implicitly prohibited acts which would manipulate the competitive market for natural gas." In re Amendments to Blanket Sales Certificates, 107 F.E.R.C. ¶ 61,174, at ¶ 12. Consequently, FERC maintained the power not only to monitor the market to ensure that natural gas companies charged just and reasonable rates under the NGA, but also to condition and terminate a seller's certificate for misconduct. Id. at 7116, 11; Order

Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, 103 F.E.R.C. ¶ 61,343, at ¶ 70 (2003) (stating that for FERC to carry out the NGA's purposes, "it must have the authority to terminate a certificate when the holder violates the certificate by deliberately engaging in misconduct that undermines the basic purpose for issuing the certificate in the first instance").

However, "[i]n light of the market manipulations in the West in 2000-2001, which occurred despite the implicit prohibitions in gas certificate authorizations . . ., the Commission found it necessary, in order to ensure the competitiveness of the market, to explicitly prohibit acts intended to manipulate the natural gas market . . . ." In re Amendments to Blanket Sales Certificates, 107 F.E.R.C. ¶ 61,174, at ¶ 12. As a result, in 2003, FERC made explicit what was once implicit by issuing Order No. 644, which amended the blanket certificates so as to integrate a code of conduct expressly prohibiting "jurisdictional sellers from undermining the competitiveness of the marketplace by engaging in abusive or manipulative acts," such as wash trades, collusion, and false reporting to price indices. Id. at ¶ 17.

FERC issued Order No. 644 pursuant to its power under sections five, seven, and sixteen of the NGA without any additional authorizing legislation. Order No. 644 summarizes FERC's Market Behavior Rules as follows:

> Under [18 C.F.R. § 284.403] . . . any person making natural gas sales for resale in

> interstate commerce . . . is prohibited from engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion.
>
> . . . To the extent [such a person] . . . engages in reporting of transactions to publishers of gas price indices, [it] shall provide complete and accurate information to any such publisher . . . .

Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at TR 4-5.

FERC's Market Behavior Rules were based in part on FERC's Price Discovery in Natural Gas & Electric Markets in which FERC issued a Policy Statement after "exploring the process by which price indices influence and reflect the formation of wholesale prices for natural gas and electricity." 104 F.E.R.C. ¶ 61,121, at ¶ 1 (2003). In the Policy Statement, FERC stated it has "broad authority under Sections 14(a) and 16 of the Natural Gas Act[4] . . . to

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[4] Section 14(a) of the NGA (15 U.S.C. § 717m(a)) provides:

> The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provisions of this chapter or any rule, regulation, or order thereunder . . . .

Section 16 of the NGA (15 U.S.C. § 717o) provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

investigate and gather relevant data and to make such orders, rules and regulations as may be necessary to carry out the provisions of the NGA." Id. at ¶ 44. Accordingly, FERC drafted the Market Behavior Rules to "strike a careful balance" between giving customers "an effective remedy in the event anticompetitive behavior or other market abuses occur" and providing sellers "clearly-delineated" rules to follow. Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at ¶ 2. Further, FERC designed the Rules "to provide market participants adequate opportunities to detect, and the Commission to remedy, market abuses." Id. at ¶ 6.

Congress subsequently enacted the Energy Policy Act of 2005 ("EPAct"), in which Congress expanded FERC's authority over manipulative conduct in the natural gas market. Energy Policy Act of 2005, Pub. L. No. 109-58, 199 Stat. 594 (2005). The EPAct made it unlawful "for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers." 15 U.S.C. § 717c-1. Pursuant to this statutory command, FERC issued a new regulation setting forth prohibited manipulative conduct:

> It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or

> sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,
>
> > (1) To use or employ any device, scheme, or artifice to defraud,
> >
> > (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> >
> > (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

18 C.F.R. § 1c.1(a).

As FERC itself has explained, § 1c.1 does not "expand the types of transactions subject to the Commission's jurisdiction" under the relevant statutes. Prohibition of Energy Market Manipulation, 114 F.E.R.C. ¶ 61,047, 61,128 at ¶ 16 (2006). However, the new regulations apply if "any entity" engages in manipulative conduct "in connection with" a jurisdictional transaction. Id. "Absent such nexus to a jurisdictional transaction, however, fraud and manipulation in a non-jurisdictional transaction (such as a first or retail sale) is not subject to the new regulations." Id. Misconduct is "in connection with" a jurisdictional transaction if there is a "nexus" between an entity's fraudulent conduct and a jurisdictional transaction. Id. at ¶ 22. FERC gave the following as an example

that would fall within its jurisdiction under the EPAct:

> For example, any entity engaging in a non-jurisdictional transaction through a Commission-regulated RTO/ISO market, that acts with intent or with recklessness to affect the single price auction clearing price (which sets the price of both non jurisdictional and jurisdictional transactions), would be engaging in fraudulent conduct in connection with a jurisdictional transaction and, therefore, would be in violation of the Final Rule.

Id. Although FERC has assumed broadened authority under the EPAct, FERC has rejected the idea that Congress intended to expand its jurisdiction to include anti-manipulation authority over previously state-regulated aspects of the natural gas market, remarking that had Congress intended such a result, "it would have done so explicitly." Id. at ¶ 20.

After § 1c.1 became effective, FERC implemented this interpretation by exercising its regulatory authority over a non-jurisdictional seller engaged in a non-jurisdictional transaction. Order Denying Rehearing, 121 F.E.R.C. ¶ 61,224 (2007) ("Amaranth"). In Amaranth, FERC determined Amaranth's alleged manipulative trading of NG Futures Contracts, which FERC does not regulate directly, had a direct effect on the price of natural gas sales within FERC's jurisdiction, and therefore Amaranth was subject to FERC's jurisdiction under the EPAct. Id. at ¶ 15-45. As FERC noted, this exercise of authority over a non-jurisdictional seller

engaged in a non-jurisdictional transaction was a direct result of the EPAct's expansion of FERC authority:

> Prior to 2005, the Commission had authority under section 4(a) to punish manipulation by sellers in physical natural gas markets and, therefore, had promulgated "Market Behavior Rules" prohibiting manipulation by such sellers. Congress is not presumed to enact surplusage. The better interpretation is that Congress meant to expand Commission authority beyond what existed in 2005 to proscribe the conduct alleged [against Amaranth].

Id. at ¶ 29 (footnotes omitted). Although the EPAct extended FERC's jurisdictional reach over certain entities it previously could not have reached, FERC's jurisdiction over "the scope of 'transactions' . . . is the same as that covered by pre-existing NGA provisions and was not expanded by EPAct 2005." Id. at ¶ 64. FERC specifically gave the example that "a manipulation pertaining only to a 'first sale' would not be covered." Id.

Section 1c.1 became effective upon publication of the Final Rule in the Federal Register in 2006, and therefore does not apply to Defendants' alleged misconduct in this case, which allegedly occurred in 2000 to 2002. Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244-03, at ¶ 71 (Jan. 26, 2006). Nevertheless, FERC's discussion of its authority under the EPAct and § 1c.1 in contrast with its prior authority provides some guidance on

the scope of FERC's jurisdiction over Defendants' alleged misconduct. FERC has indicated that both before and after the EPAct, FERC has no authority to regulate market manipulation occurring in non-jurisdictional transactions, such as first sales. Further, FERC has indicated the EPAct expanded its authority to regulate manipulation occurring in non-jurisdictional markets which affects transactions within its jurisdiction. For example, price manipulations in the retail market which affect jurisdictional rates through reporting to a common price index, now may subject any entity making such manipulations to FERC's jurisdiction. That the EPAct expanded FERC's authority to reach such conduct implies FERC lacked that power prior to the EPAct.

Reviewing the dual regulatory scheme, FERC's limited jurisdictional reach, and FERC's interpretations of its own authority, the Court concludes the NGA does not preempt Plaintiffs' claims so long as those claims allege both that Plaintiffs were harmed by purchasing natural gas in non-jurisdictional sales transactions and that Defendants allegedly engaged in misconduct in non-jurisdictional transactions. If either the injury-causing transaction or the alleged market manipulation occurred within FERC's jurisdiction, Plaintiffs' claims would be preempted. However, where FERC has jurisdiction over neither the injury-causing sale nor the manipulative conduct, FERC lacks jurisdiction and therefore cannot preempt state law.

Because Congress specifically has removed certain subjects from FERC's jurisdiction, it is clear Congress did not intend FERC to occupy the field of market manipulation in non-jurisdictional transactions. For similar reasons, state regulation of manipulation in non-jurisdictional transactions likely would not conflict directly with federal regulation. Additionally, state antitrust laws punishing non-competitive conduct in non-jurisdictional transactions are complimentary to FERC's stated goals of eliminating manipulative conduct in jurisdictional markets to ensure competitive markets and to protect consumers against exploitation.

The Court's prior Orders were premised in part on a lack of precision on both the Court's and the parties' part regarding where the alleged market manipulation occurred. In J.P. Morgan, the Court stated that Defendants' alleged false reporting to price indices, collusion, and wash trades artificially inflated and distorted wholesale gas prices which damaged Plaintiff . . . ." (Order [Doc. #448] at 15-16 (emphasis added).) In Learjet, the Court discussed possible preemption, but concluded that it was unclear from the face of the Complaint whether FERC had jurisdiction over Defendants and their alleged misconduct because Defendants could have engaged only in non-jurisdictional transactions. (Order [Doc. #547] at 21-24.)

Following this Court's preemption Orders, the Ninth Circuit issued decisions in related multidistrict litigation on previous orders from this Court and another district court on the issue of

whether the filed rate doctrine barred similar state law claims. The filed rate doctrine refers to the principle that FERC's determination of a lawful rate preempts through the Supremacy Clause any conflicting state determination. E. & J. Gallo Winery, 503 F.3d at 1035. The filed rate doctrine bars courts from determining what a just and reasonable rate would have been absent the alleged manipulation because determining just and reasonable rates in the wholesale market lies exclusively within FERC's province. Id. at 1033-35.

In Gallo, the plaintiff alleged manipulations in the natural gas market, including wash trades and false price reporting to indices, resulting in the plaintiff paying a higher rate where the price it paid for natural gas was pegged to indices published in trade publications. Id. at 1030-31. The defendants moved for summary judgment, arguing the filed rate doctrine barred the plaintiff's claims because the district court would have to determine a hypothetical rate absent manipulation to determine the plaintiff's damages. Id. at 1032. The district court denied the motion, but certified the question for interlocutory appeal to the Ninth Circuit. Id.

The Ninth Circuit ruled that, viewing the facts in the light most favorable to the plaintiff, the indices potentially included both jurisdictional and non-jurisdictional transactions. Id. at 1045. Because it was possible the plaintiff could prove its claim relying solely on allegedly manipulated non jurisdictional rates associated with fictitious sales, retail sales, and first sales, areas from which Congress withdrew FERC's jurisdiction, the Ninth

Circuit held a genuine issue of material fact remained regarding whether the filed rate doctrine barred the plaintiff's claims. Id.

Although Gallo addressed only the preemptive force of the filed rate doctrine, the opinion is instructive on the issues presently before the Court. According to the Gallo Court:

> to the extent FERC has jurisdiction over the transportation of natural gas in interstate commerce and exercises that authority to approve interstate transportation rates, the Filed Rate Doctrine would prevent Gallo from basing damage claims on such rates. However, as previously discussed, Gallo is challenging at least some conduct that is not approved by FERC, and thus not barred by FERC's jurisdiction over interstate transportation.

Id. at 1048; see also Am. Gas Ass'n v. F.E.R.C., 912 F.2d 1496, 1506-07 (D.C. Cir. 1990) (rejecting pipeline companies' argument that FERC had jurisdiction over pipeline companies' non jurisdictional contracts, even if such contracts would impact indirectly a pipeline company's FERC-approved rates). "In the absence of FERC jurisdiction over non jurisdictional transactions reported in the indices, the Filed Rate Doctrine does not bar damage claims based on rates arising from such transactions." E. & J. Gallo Winery, 503 F.3d at 1048.

Many entities engage in both jurisdictional and non jurisdictional sales. That FERC has jurisdiction

over entities engaged in jurisdictional sales does not mean FERC has exclusive jurisdiction over those companies' conduct in non jurisdictional transactions. The NGA does not "abolish all overlapping." Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464, 473-474 (1950). For example, the Commission may "investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." Id. at 474 (citing Section 5(b) of the NGA). "Yet clearly the state agency establishing such a rate would have equivalent authority." Id. Congress has committed non jurisdictional transactions to state control, and therefore state law would have at least equivalent authority to address manipulative conduct occurring in retail and first sales transactions, even if the entity engaged in those transactions also is subject to FERC's jurisdiction when it participates in jurisdictional sales.

Here, viewing the facts in the light most favorable to Plaintiffs, it is possible that Plaintiffs may be able to prove Defendants conspired to control natural gas rates and engaged in manipulative conduct in non-jurisdictional transactions, including wash trades and false reporting of retail and first sale rates to price reporting indices. Additionally, Plaintiffs allege they purchased natural gas at the artificial rates in non-jurisdictional transactions. In such circumstances, FERC would have no jurisdiction over either the injury-causing transaction or the transactions in which Defendants engaged in the

alleged misconduct. Prior to the EPAct at least,[5] FERC would have no jurisdiction to regulate manipulative conduct in non-jurisdictional transactions, even over natural gas companies which also engaged in jurisdictional sales during the same time period.

Additionally, Defendants have not explained why it would be impossible to comply with both state and federal law where both preclude manipulative conduct in the natural gas markets. The state antitrust laws compliment FERC's goals. To the extent application of state antitrust laws to non-jurisdictional misconduct impacts matters within FERC's control, such an effect is incidental to achieving the proper state purpose of preventing anticompetitive behavior in state-controlled natural gas transactions.

The Court therefore will deny Defendants' motions for summary judgment. Defendants' status as jurisdictional sellers during the relevant time period does not preclude the possibility that Defendants engaged in manipulative conduct in non-jurisdictional transactions, such as providing false price reports on non-jurisdictional transactions to

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[5] The question may be closer now under the EPAct, which gives FERC authority over manipulative conduct that indirectly affects jurisdictional rates, and where the "bright line" between state and federal regulation is blurred by interrelated price reporting to indices which include both jurisdictional and non-jurisdictional rates. The question is not before the Court, however, because Defendants' alleged conduct occurred prior to Congress expanding FERC's authority under the EPAct.

trade indices, falling outside FERC's exclusive jurisdiction. Because the Court will deny Defendants' motions, the Court also will deny Plaintiffs' motions for discovery under Federal Rule of Civil Procedure 56(f) as moot.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Joint Motion for Summary Judgment (Doc. #764; Doc. #108 in 2:05-CV-01331-PMP-PAL; Doc. #135 in 2:06-CV-00233-PMP-PAL) is hereby DENIED.

IT IS FURTHER ORDERED that Defendants Reliant Energy Services, Inc., The Williams Companies, Inc., Williams Merchant Services Company, Inc., Williams Power Company, Inc., Oneok, Inc., and Oneok Energy Services Company, L.P.'s Joinder in Defendants' Joint Motion for Summary Judgment (Doc. #816; Doc. #119 in 2:05-CV-01331-PMP-PAL; Doc. #147 in 2:06-CV-00233-PMP-PAL) is hereby DENIED.

IT IS FURTHER ORDERED that El Paso's Joinder in Defendants' Motion for Summary Judgment (Doc. #827; Doc. #125 in 2:05-CV-01331-PMP-PAL; Doc. #154 in 2:06-CV-00233-PMP-PAL) is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Joint Motion for Discovery and Continuance of Decision Pursuant to FRCP 56(e)(1) and (f) (Doc. #131/132 in 2:05-CV-01331-PMP-PAL; Doc. #159/160 in 2:06-CV-00233-PMP-PAL) is hereby DENIED.

DATED: May 14, 2008.

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL 1566

IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

Case Nos.
2:03-CV-01431-PMP (PAL) BASE FILE
2:05-CV-01331-PM-(PAL)

J.P. MORGAN TRUST COMPANY,
NATIONAL ASSOCIATION, in its
Capacity as Trustee of FLI Liquidating Trust,

Plaintiff,

v.

THE WILLIAMS COMPANIES, INC., et al.,

Defendants.

ORDER

Presently before this Court is Plaintiff's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) (2:05-CV-01331-PMP-PAL, Doc. #57), filed on January 19, 2007. Defendants filed an Opposition (2:05-CV-01331-PMP-PAL) on February 6, 2007. Plaintiff filed a Reply (2:05-CV-01331-PMP-PAL, Doc. #60) on February 16, 2007.

Also before the Court is Plaintiff's Motion for Discovery and Continuance of Decision Pursuant to FRCP Rule 56(f) (2:05-CV-01331-PMP-PAL, Doc. #62), filed on April 25, 2007. Defendants filed a Joint Memorandum in Opposition to Plaintiff's Motion for Discovery and Continuance of Decision Pursuant to FRCP 56(f) (2:05-CV-01331-PMP-PAL, Doc. #66) on May 11, 2007. Plaintiff filed a Reply (2:05-CV-01331-PMP-PAL, Doc. #68) on May 23, 2007.

Also before the Court is Defendants' Request for Judicial Notice in Support of Response to Court's Orders of April 3, 2007 (2:05-CV-01331-PMP-PAL, Doc. #65), filed on April 25, 2007. Plaintiff filed a Response (2:05-CV-01331-PMP-PAL, Doc. #68) and Joint Evidentiary Objections (2:05-CV-01331-PMP-PAL, Doc. #67) on May 23, 2007.

On May 30, 2007, the Court conducted a hearing on the foregoing motions.

I. BACKGROUND

On December 18, 2006, this Court entered an Order (2:05-CV-01331-PMP-PAL, Doc. #53) granting Defendants' motion to dismiss based on the doctrines of field and conflict preemption. Central to the Court's Order was that Defendants possessed blanket marketing certificates which subjected Defendants and their conduct to the Federal Energy Regulatory Commission's ("FERC") jurisdiction under the Natural Gas Act ("NGA"). Believing no dispute existed regarding Defendants' possession of blanket marketing certificates, the Court dismissed Plaintiff's antitrust claims.

On January 19, 2007, Plaintiff filed the present Motion to Alter or Amend Judgment and Memorandum in Support of Motion to Alter or Amend Judgment arguing the Court committed clear error because it based its decision on factual findings unsupported by the record, the Court misinterpreted the scope of FERC's jurisdiction, the Court's past complete preemption orders are inconsistent with its field preemption analysis in this case, and the Court applied the wrong legal standard to its field preemption analysis. Defendants filed an Opposition to Plaintiff's Motion to Alter or Amend Judgment on February 6, 2007, urging the Court to deny Plaintiff's motion.

On April 3, 2007, the Court issued an Order requesting Defendants to verify their possession of blanket certificates during the relevant time period. In response to the Court's April 3 Order, Plaintiffs[1] filed a joint motion requesting a hearing regarding Defendants' verification of blanket certificates and a motion for discovery pursuant to Federal Rule of Civil Procedure 56(f). On April 25, 2007, Defendants filed a response to the Court's April 3 Order explaining that Defendants possessed blanket marketing certificates by operation of law.

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[1] The Court's April 3 Order requested Defendants in this case and Defendants in Learjet, Inc. et al. v. Oneok, Inc. et al., 2:06-CV-0233-PMP-PAL to verify their possession of blanket marketing certificates because possession of blanket marketing certificates is an issue in both cases. Accordingly, Plaintiff in this case and Plaintiffs in the Learjet case responded to the Court's Order as well as Defendants' motions and submissions pertaining thereto.

Defendants also requested the Court take judicial notice of certain documents purportedly establishing Defendants' affiliations with natural gas pipelines or local distribution companies ("LDCs"). Defendants argue their affiliations with pipelines or LDCs provide an independent basis for FERC's jurisdiction over the gas marketing Defendants and therefore provide an alternative ground for dismissal.

II. LEGAL STANDARD

A court has "considerable discretion" when considering a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). Turner v. Burlington N. Santa Fe R. Co., 338 F.3d 1058, 1063 (9th Cir. 2003). Generally, such a motion "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003). A litigant may not use a Rule 59(e) motion "to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." Id. Moreover, the losing party cannot use a Rule 59(e) motion as a vehicle to relitigate old matters. Brogdon v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000).

III. DISCUSSION

A. Blanket Certificates

As stated in the Court's December 18 Order granting Defendants' motion to dismiss, pursuant to

the NGA FERC has jurisdiction over matters relating to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation and sales. (Order at 8 [citing 15 U.S.C. § 717(b)].) Consequently, if Defendants are natural gas companies engaged in sales for resale within FERC's jurisdiction, even if those sales were not to Plaintiff, FERC has jurisdiction over Defendants and their alleged misconduct. Under section seven of the NGA, to engage in a sale for resale within FERC's jurisdiction, a natural gas company must have a certificate of public convenience and necessity issued by FERC. 15 U.S.C. § 717f(c)(1)(A). Pursuant to its authority under section seven of the NGA, FERC decided to issue blanket certificates authorizing pipelines and other persons selling natural gas to make wholesale sales at negotiated or market-based rates. See 18 C.F.R. § 284.284(a); 18 C.F.R. § 284.402(a). These "blanket certificates were issued by operation of the rule itself and there was no requirement for persons to file applications seeking such authorization." Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at ¶ 11 (2003).

Based on the parties' filings, the Court addressed Defendants' motion to dismiss on the assumption that Plaintiff conceded Defendants possessed blanket marketing certificates and thus conceded Defendants engaged in sales for resale within FERC's jurisdiction during the relevant time period.[2]

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[2] In their Motion to Dismiss, Defendants stated they held blanket certificates and explained in depth the certificates'

However, Plaintiff now moves the Court to alter or amend the December 18 Order, arguing it never conceded Defendants held blanket marketing certificates or engaged in sales for resale within FERC's jurisdiction during the relevant time period and the Court therefore erred by making a factual determination in deciding a motion to dismiss.

Pursuant to FERC Order 644, FERC "issued blanket certificates to all persons who are not interstate pipelines authorizing them to make jurisdictional sales for resale" and that such issuance occurred "by operation of the rule itself," which meant "there was no requirement for persons to file applications seeking such authorization." Id. Accordingly, Defendants possessed blanket marketing certificate authority as a matter of law. However, whether Defendants are natural gas companies under FERC's jurisdiction depends on whether Defendants actually engaged in such sales for resale pursuant to their blanket certificate

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legal significance. (Defs.' Mot. to Dismiss & Mem. in Support of Mot. to Dismiss [2:05-CV-01331-PMP-PAL, Doc. #32] at 14-16.) In its Opposition, Plaintiff never disputed Defendants possessed blanket marketing certificates; instead Plaintiff attempted to minimize the certificates' legal import by stating "[t]he Court should not be misled by Defendants' attempt to make their certificates into more than they are. In the context of this state antitrust case, they are meaningless." (Pl.'s Resp. to Defs.' Mot. to Dismiss Based upon Filed Rate & Federal Preemption Principles [2:05-CV-01331, Doc. #38] at 23.) Based on the parties' statements, the Court concluded "[a]ll parties agree Defendants participated in the interstate natural gas market pursuant to FERC-issued blanket certificates" and proceeded to rule on the certificates' legal significance. (Order at 16.)

authority.[3] Under the motion to dismiss standard, the Court must take as true the allegations in the complaint and construe them in a light most favorable to the non-moving party. Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). Because Plaintiff did not allege Defendants engaged in sales for resale within FERC's jurisdiction ("jurisdictional sales") during the relevant time period, the Court committed clear error in concluding Defendants engaged in such sales pursuant to their blanket marketing certificate authority.

At the May 30 hearing and in their papers, Defendants advance a number of arguments attempting to show they engaged in jurisdictional sales during the relevant time period. First, Defendants argue Plaintiff's Amended Complaint alleges Defendants engaged in jurisdictional sales. Paragraph 54 of the Amended Complaint states: "[t]he companies that sold natural gas to plaintiff passed on the artificially inflated prices that they paid for natural gas." (Pl.'s Am. Comp. at 36.) This

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[3] If Defendants engaged in sales for resale within FERC's jurisdiction during the relevant time period, then FERC has jurisdiction over Defendants' alleged misconduct. While FERC did not expressly prohibit false reporting and wash trades during the relevant time period, it did so later in 2003 without any additional authorizing legislation from Congress. This demonstrates FERC always had the power to regulate the conduct of persons engaged in sales for resale subject to FERC's jurisdiction. However, FERC's promulgation of its Code of Conduct in 2003 was limited in scope and applied only to those persons making natural gas sales for resale in interstate commerce. See 18 C.F.R. § 284.403 (2003).

sentence does not establish Defendants engaged in jurisdictional sales. Paragraph 54 appears to recognize sales for resale occurred — i.e. "the companies that sold natural gas to plaintiff' purchased natural gas from somebody else and then resold it to Plaintiff. However, paragraph 54 does not allege Defendants were the ones who sold natural gas to "the companies that sold natural gas to plaintiff' or that those sales for resale were sales within FERC's jurisdiction. Therefore, the Amended Complaint does not allege Defendants engaged in jurisdictional sales during the relevant time period.

Second, Defendants argue that by pleading Defendants engaged in "wash trades" [4] and "churning," [5] Plaintiff pleaded that Defendants engaged in jurisdictional sales because wash trades and churning are by definition "sales for resale." Defendants' assertion that wash trades and churning are by definition sales for resale, even if true, does not mean the alleged wash trades and churning occurred within FERC's jurisdiction because not all sales for resale are jurisdictional sales.

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[4] A "wash trade" is a prearranged offsetting trade of the same product between the same parties, which involves no net change in ownership and no economic risk. Such trades create a false price for use in indices. Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, ¶ 38, ¶ 53.

[5] "Churning" refers to rapid sales and corresponding purchases of product that result in the appearance of an increase in market demand. In re W. States Wholesale Natural Gas Antitrust Litig., 346 F. Supp. 2d 1123, 1135 n.10 (D. Nev. 2004).

The Natural Gas Policy Act ("NGPA") deregulated "first sales" of natural gas, which are defined as "any sale to an interstate or intrastate pipeline, LDC or retail customer, or any sale in the chain of transactions prior to a sale to the interstate or intrastate pipeline or LDC or retail customer." Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at ¶ 14 (emphasis omitted). Thus, "all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or LDC." Id. However, a sale "of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof' is exempted from first sale status and therefore falls under FERC's jurisdiction "unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof." 15 U.S.C. § 3301(21). In other words, FERC has jurisdiction over "all sales for resale by interstate and intrastate pipelines and LDCs and their affiliates, other than their sales of their own production." Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at ¶ 14.

The Amended Complaint alleges Defendants' sales of natural gas included their own or their affiliates' production. Thus, taking the allegations in the Amended Complaint as true, even if Defendants' alleged wash trades and churning are by definition sales for resale, they are not jurisdictional sales for resale under the first sales exemption because FERC does not have jurisdiction over sales for resale by interstate and intrastate pipelines, LDCs, and their

affiliates if they sell their own production. Accordingly, based on the Amended Complaint, the Court cannot conclude Defendants' alleged wash trades and churning are sales for resale within FERC's jurisdiction.

Finally, Defendants argue FERC has stated in two of its previous orders that at least two Defendants' transactions fell within FERC's jurisdiction. FERC issued two orders with respect to Defendants Reliant and Duke Energy in October 2003 and December 2003, respectively.[6]

"When ruling on a motion to dismiss, the Court may consider the facts alleged in the Complaint, documents attached to the Complaint, documents relied upon but not attached to the Complaint when authenticity is not contested, and matters of which the Court takes judicial notice." Marsh v. San Diego County, 432 F. Supp. 2d 1035, 1043 (S.D. Cal. 2006). Under Federal Rule of Evidence 201, a court may take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." As to the second category of judicially noticeable facts, a court appropriately may take judicial notice of matters of public record, including FERC orders. Transmission

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[6] Order Approving Stipulation & Consent Agreement (Reliant), 105 F.E.R.C. ¶ 61008, ¶ 29 (2003); Order Approving Stipulation & Consent Agreement (Duke), 105 F.E.R.C. ¶ 61307, ¶ 16 (2003).

Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 924 n.3 (9th Cir. 2002); Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001). However, when a court takes judicial notice of a matter of public record, such as another court's opinion, it may not do so "for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." Lee, 250 F.3d at 690 (quoting S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426-27 (3d Cir. 1999); see also Marsh, 432 F. Supp. 2d at 1044 (stating a court may take judicial notice of a document's contents, but not the truth of those contents.)

The Court may take judicial notice of FERC's orders with respect to Reliant and Duke Energy under Fed. R. Evid. 201 because the orders are not subject to reasonable dispute and are capable of accurate and ready determination. The Court, however, may not take judicial notice of the orders for the truth of the facts stated therein, i.e. that Reliant and Duke Energy engaged in jurisdictional sales during the relevant time period. Because this is precisely the purpose for which Reliant and Duke Energy offer the orders, the Court will not take judicial notice of them and therefore will not dismiss Reliant and Duke on that basis.

Because the Amended Complaint does not allege Defendants engaged in jurisdictional sales during the relevant time period, the Court committed clear error in rendering its December 18 Order. Accordingly, the Court will grant Plaintiff's motion

to alter or amend judgment and will deny Defendants' motion to dismiss based on preemption.

B. Filed Rate Doctrine

As an alternative to Defendants' preemption arguments in their motion to dismiss (2:05-CV-01331-PMP-PAL, Doc. #32), Defendants argued the Court should dismiss Plaintiff's claims based on the filed rate doctrine. Because the Court did not address Defendants' filed rate doctrine arguments in its December 18 Order, the Court will do so now.

Defendants argue the allegations in Plaintiff's Amended Complaint are virtually the same as the allegations in previous complaints this Court dismissed under the filed rate doctrine and therefore the Court should dismiss Plaintiff's claims as well. Plaintiff responds that the filed rate doctrine is inapplicable to this case because of the unique nature of the Kansas "full consideration" statute under which it has brought suit. Specifically, Plaintiff argues Kansas' full consideration statute does not require this Court to engage in an overcharge analysis or theorize a but-for competitive price in contravention of the filed rate doctrine. Instead, Plaintiff contends under the full consideration statute Plaintiff may use routine business records, such as invoices or other financial records, to establish the complete measure of Plaintiff's antitrust damages.

The NGA charges FERC with the statutory authority to ensure that all rates charged for the interstate sale of natural gas are just and reasonable. Section 717c(a) of the NGA provides:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

15 U.S.C. § 717c(a). In interpreting the scope of FERC's power under the NGA, the Supreme Court has found that, "the authority to decide whether the rates are reasonable is vested by § 4 of the Act solely in the Commission." Ark. La. Gas Co. v. Hall, 453 U.S. 571, 573 (1981).

"The 'filed rate doctrine' prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act . . . ." Id. Two basic principles underlie the filed rate doctrine: (1) "no court may substitute its own judgment on reasonableness for the judgment of the Commission;" and (2) "the authority to decide whether rates are reasonable is vested solely in FERC." Id. at 577.

The United States Court of Appeals for the Ninth Circuit has explained that "[t]he doctrine applies to rates charged by railroads, natural gas companies, and other interstate operators over whom federal agencies have exclusive power to set rates." Transmission Agency of N. Cal, 295 F.3d at 929 (internal citations omitted). The filed rate doctrine applies both to federal and state causes of action

relating to rates established by federal agencies. County of Stanislaus v. Pac. Gas & Elec. Co., 114 F.3d 858, 863 (9th Cir. 1997). To allow recovery under state law would allow a state court, or a federal court applying state law, to undermine the authority of a federal agency and impermissibly would contravene the Supremacy Clause. Id.

In Stanislaus, the plaintiffs, natural gas consumers, sued the defendant public utility company alleging various antitrust violations. Id. at 860. The Ninth Circuit concluded that because FERC reviewed the price set between the plaintiffs and the defendant, the filed rate doctrine barred all claims in the case. Id. at 863. Specifically, the file rate doctrine barred the damages calculation because the Court would have to determine what the rate would have been absent the alleged misconduct. Id. A claim for damages based on a filed rate was too speculative because it would have required a showing that FERC should and would have adopted a hypothetical lower rate. Id.

In In re: Western States Wholesale Natural Gas Antitrust Litigation (Abelman), this Court stated "[t]he critical factor in the filed rate doctrine's application is the nature of the damages the plaintiff s[eeks]." 408 F. Supp. 2d 1055, 1068 (D. Nev. 2005). In Abelman, the Court dismissed the plaintiffs' claims under the filed rate doctrine because the damages the plaintiffs sought would have required the Court "to make a determination as to what a just and reasonable rate would have been in the wholesale natural gas market, thereby usurping a

function Congress has explicitly assigned to FERC." Id. at 1067.

The Kansas full consideration statute states:

> any person injured or damaged by any such arrangement, contract, agreement, trust or combination, described in K.S.A. 50-112 and 50-113, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money borrowed.

Kan. Stat. Ann. § 50-115. Under this statute, Plaintiff's damage calculation will not require the Court to determine what a just and reasonable rate would have been in the natural gas market absent Defendants' alleged misconduct. Rather, Plaintiff will be able to calculate damages by presenting evidence of sums paid to Defendants for natural gas during the relevant time period.

Defendants argue even if the Kansas full consideration damages provision permits Plaintiff to show damages without running afoul of the filed rate doctrine, Plaintiff must prove Defendants' misconduct injured Plaintiff. Defendants argue Plaintiff cannot prove an antitrust injury, which is a prerequisite to an award of the full consideration damage remedy, without requiring the Court to calculate what rates would have been in the interstate natural gas market absent Defendants'

alleged misconduct. Defendants argue if Plaintiff cannot show Defendants' alleged misconduct artificially raised rates, then Plaintiff cannot prove it sustained injury entitling it to recover damages. In addition, Defendants argue Plaintiff expressly alleges in the Amended Complaint that it was injured as a result of having to pay more for natural gas than it would have paid in the absence of Defendants' misconduct. Thus, Defendants argue any attempt by Plaintiff to show an alternative injury is not supported by the allegations in the Amended Complaint.

In response, Plaintiff argues it will not have to establish Defendants charged artificially higher prices to establish injury, but only that Defendants controlled or manipulated prices. Plaintiff argues it is able to show Defendants' conspiracy to manipulate or control prices injured Plaintiff because Plaintiff was deprived of the right to make risk management, resource allocation and other financial decisions in a full and free natural gas market.

Kansas Statutes Annotated § 50-112 states in relevant part:

> All arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, . . . and all arrangements, contracts, agreements, trusts or combinations between persons, designed or

> which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles . . . are hereby declared to be against public policy, unlawful and void.

Under this statute, Plaintiff may show Defendants committed an antitrust violation by means other than showing Defendants' alleged misconduct artificially increased natural gas prices because a person violates the statute by agreeing to control prices. The Amended Complaint alleges Defendants agreed to manipulate or control the market prices of natural gas and as a result Plaintiff was deprived of the right to make risk management, resource allocation and other financial decisions in a full and free natural gas market. (See Am. Compl. ¶ 58(b).) Thus, Plaintiff alleged a violation of the statute.

As for injury, the Amended Complaint repeatedly alleges Plaintiff was injured as a result of having to pay more for natural gas than it would have paid absent the alleged misconduct. Under the "Damages" section of the Amended Complaint Plaintiff alleges, "[d]uring the relevant time period of the antitrust violations by the defendants and their coconspirators, plaintiff purchased natural gas, and by reason of the violations alleged herein, paid more for natural gas than it would have paid in the absence of such antitrust violations. As a result, plaintiff has been injured." (Am. Compl. ¶ 63; see also ¶ 53-54, ¶ 56, ¶ 60(d).) However, construing the Amended Complaint in a light most favorable to Plaintiff, Plaintiff also alleges it was injured as a result of being "deprived of the right to make risk

management, resource allocation and other financial decisions in a full and free competitive market for natural gas." (Id. at ¶ 60(e).)

Under this injury theory, the Court will not have to determine what a just and reasonable rate would have been in the interstate market. Evidence of price control, price artificiality, or Plaintiff's financial decisions during the relevant time period would not require the Court to determine whether the prices charged during the relevant time period were just and reasonable or to set a but-for competitive price in contravention of the filed rate doctrine.

Moreover, the Court rejects Defendants' argument that any damage award with respect to the alleged misconduct in this case violates the filed rate doctrine because it would effectively impose a different rate on FERC-jurisdictional transactions and upset the federal scheme of uniform rate regulation. At its core, "[t]he filed rate doctrine bars all claims that would involve an assessment of what rates would have been charged in the interstate natural gas market absent the allegedly wrongful conduct." (Defs.' Mot. To Dismiss & Mem. in Support of Mot. to Dismiss [2:05-CV-1331-PMP-PAL, Doc. #32], at 6.) Awarding full consideration damages under the Kansas antitrust statutes would not require the Court to make "an assessment of what rates would have been charged" or to determine the reasonableness of such rates. Further, to the extent Defendants argue that they could pass on any damage award to their customers which might affect future rates, the reasonableness,

amount, and lawfulness of such future rates would fall squarely within FERC's jurisdiction. By awarding full consideration damages, the Court would not be setting a hypothetical rate, mandating or imposing a new rate, or deciding the reasonableness of any past, present, or future rate. Consequently, the filed rate doctrine does not bar Plaintiff's Kansas antitrust claims and the Court therefore will deny Defendants' motion to dismiss based on the filed rate doctrine.

C. Judicial Notice & Motion for Discovery under Fed. R. Civ. P. 56(f)

Although not requested by the Court, Defendants submitted FERC orders and filings, public disclosure filings with the Securities and Exchange Commission ("SEC"), and court orders in an effort to establish particular affiliations with natural gas pipelines or LDCs during the relevant time period. Defendants request the Court take judicial notice of the facts contained in their submissions and argue that these affiliations provide an independent basis for FERC jurisdiction and therefore provide an alternative ground for dismissal of Plaintiff's claims. In response, Plaintiff contends the Court should not consider Defendants' submissions because the Court did not request them, the premise upon which Defendants' submissions are based is flawed, and Defendants' request for judicial notice does not comport with the judicial notice standard.

Defendants' affiliate argument is based on an exception to the definition of "first sales," which, as discussed above, is a category of sales over which FERC does not have jurisdiction. Under the

exception to the first sales definition, a sale "of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof' is not a first sale and therefore falls under FERC's jurisdiction "unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof." 15 U.S.C. § 3301(21).

Defendants' submissions attempting to establish individual affiliations with pipelines or LDCs only would establish FERC jurisdiction over Defendants' sales as long as Defendants and the pipelines or LDCs with whom they are affiliated did not produce the natural gas they sold. Plaintiff's Amended Complaint, however, specifically alleges Defendants sold natural gas, "including their own or their affiliates' production, to plaintiff and customers in the State of Kansas, and throughout the United States . . . ." (Am. Compl. at 33.) Because the Court must take as true the allegations in the Amended Complaint at the motion to dismiss stage, Plaintiff's allegation that Defendants sold their own or their affiliates' production of natural gas would place Defendants' sales outside the first sales exception and therefore outside of FERC's jurisdiction. Accordingly, the Court will deny Defendants' request to take judicial notice of their submissions.

Because the Court will not take judicial notice of Defendants' submissions or consider any other evidence outside of the pleadings at this stage of the litigation, the Court is not converting Defendants' motion to dismiss under Federal Rule of Civil

Procedure 12(b)(6) into a motion for summary judgment under Rule 56. Accordingly, the Court will deny Plaintiff's Motion for Discovery and Continuance of Decision Pursuant to FRCP Rule 56(f) because no summary judgment motion is currently before the Court.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) (2:05-CV-01331-PMP-PAL, Doc. #57) is hereby GRANTED.

IT IS FURTHER ORDERED that the Order granting Defendants' Motion to Dismiss (2:05-CV-01331-PMP-PAL, Doc. #53) is hereby VACATED.

IT IS FURTHER ORDERED Defendants shall file an answer to Plaintiff's Amended Complaint within thirty (30) days from the date of this Order.

IT IS FURTHER ORDERED that Defendants' Request for Judicial Notice in Support of Response to Court's Orders of April 3, 2007 (2:05-CV-01331-PMP-PAL, Doc. #65) is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Discovery and Continuance of Decision Pursuant to FRCP Rule 56(f) (2:05-CV-01331-PMP-PAL, Doc. #62) is hereby DENIED.

DATED: July 27, 2007.

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

FINAL REPORT ON
PRICE MANIPULATION IN WESTERN MARKETS
FACT-FINDING INVESTIGATION OF
POTENTIAL MANIPULATION OF
ELECTRIC AND NATURAL GAS PRICES
DOCKET NO. PA02-2-000

Prepared by the Staff of the
Federal Energy Regulatory Commission

March 2003

EXECUTIVE SUMMARY

Overview

This Report is the culmination of a yearlong effort by Commission Staff to determine whether and, if so, the extent to which California and Western energy markets were manipulated during 2000 and 2001. While Staff found significant market manipulation, this evidence does not alter the Commission's original conclusion, set forth in its December 15, 2000 Order, that significant supply shortfalls and a fatally flawed market design were the root causes of the California market meltdown.

The underlying supply-demand imbalance and flawed market design greatly facilitated the ability of certain market participants to engage in manipulation. In addition, the ability to pass through gas prices in electric power prices provided no check on gas buyers' willingness to pay.

For the first 2 years of its operation, the California market performed well and saved the state's customers billions of dollars. Only after the Pacific Northwest could no longer provide abundant supplies of low-cost hydropower to the regional market did the negative effects of too little infrastructure and poorly designed market rules adversely affect customers' bills.

A key conclusion of this Report is that markets for natural gas and electricity in California are inextricably linked, and that dysfunctions in each fed off one another during the crisis. Spot gas prices rose to extraordinary levels, facilitating the

unprecedented price increase in the electricity market. Dysfunctions in the natural gas market appear to stem, at least in part, from efforts to manipulate price indices compiled by trade publications. Reporting of false data and wash trading are examples of efforts to manipulate published price indices. This Report makes recommendations for conditions the Commission should impose to ensure that price indices represent better barometers of actual prices.

In a related finding, Staff concludes that large-volume, rapid-fire trading by a single company, in what was incorrectly assumed to be a liquid market, substantially increased natural gas prices in California. To compensate for this, Staff reiterates the recommendation of its August 2002 Initial Report, which called for the Commission to alter the natural gas pricing methodology employed in the California

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Chapter II: Topock Was Illiquid—A Single Company Substantially Increased Prices

In this chapter, we conclude that Reliant engaged in a high-volume, rapid-fire trading strategy to purchase its physical spot gas needs at Topock. Reliant often bought and sold many times its needs in quick bursts, which significantly increased the price of gas in that market. We describe this as "churning" and define its characteristics later in the chapter. We use this term even though it has other connotations in securities or futures trading because it gives the best visual image of Reliant's

behavior. Reliant's churning enabled it to reduce the overall cost of the gas it actually needed. Through its churning, Reliant profited by selling gas at or near the top of the price climb it caused. Reliant was often such a large presence at Topock (e.g., for the 3-month period from December 2000 to February 2001, nearly 50 percent of the spot gas trades at Topock on EOL were with Reliant) that its trading strategy moved the entire market price. Our analysis shows that the price of gas would have been lower by about $8.54/MMBtu in December 2000 and by about $1.69/MMBtu over the 9 months of the California Refund Proceeding absent Reliant's churning. These inflated gas prices significantly influenced index prices and the clearing prices paid by most California wholesale buyers for spot power.

Staff concludes that these gas prices are not the result of competitive conditions and would not produce just and reasonable electric prices in the California Refund Proceeding. In Chapter IV of this Report, we recommend alternative gas prices for the Commission's consideration in the California Refund Proceeding.

Recommendations To Amend Gas Marketing Certificates and Generic Proceeding

Reliant's churning did not violate the blanket certificate under which it sold gas because Section 284.402 of the regulations contains no explicit guidelines or prohibitions. We recommend that Sections 284.284 and 284.402 of the regulations be amended to provide explicit guidelines or prohibitions for trading natural gas

under Commission blanket certificates. We also suggest a generic proceeding to develop appropriate reporting and monitoring requirements for sellers of gas under Commission certificates.

Chapter III: Traders Attempted To Manipulate Price Indices Through False Reporting

Market participants provided false reports of natural gas prices and trade volumes to industry publications. These publications used the reports to compile price indices, and false reporting became epidemic. Five major traders (Williams, Dynegy, AEP, CMS, and El Paso Merchant Energy) have admitted that their employees falsified information provided to *Gas Daily* and *Inside FERC*, the most influential and relied-upon compilers of natural gas price indices. The false reporting included fabricating trades, inflating the volume of trades, omitting trades, and adjusting the price of trades.

The predominant motives for reporting false information were to influence reported gas prices, to enhance the value of financial positions or purchase obligations, and to increase reported volumes to attract participants by creating the impression of more liquid markets. Market participants that sold power in California, or that were affiliated with such sellers, also had incentives to manipulate reported prices because the clearing price set for power was based, in part, on natural gas spot prices.

Many traders acknowledged that false reporting was done openly in the industry. Some traders

believed that the periodicals that prepared the indices were able to distinguish between fictional and accurate reports, but the Staff was unable to confirm that the periodicals could discern fictional trades and eliminate them from the index calculation. The widespread false reporting led Staff to conclude that reported prices did not reliably reflect market activity and, accordingly, that reported prices should not provide the basis for setting spot power clearing prices in the California Refund Proceeding.

Recommendations for Changes in the Reporting Process

Staff recommends various changes to the price reporting process. These changes will eliminate the ability and incentive of those reporting the data to manipulate the indices and will improve the price calculation methods.

- Only data that can be audited and verified by the Commission or other agencies can be used to construct the natural gas or electric price index.

* * *

- Coral
- CMS
- Sempra Energy Trading

At a minimum, these companies need to show the following:

- Those employees, including trading desk heads and managers, who participated in manipulations or attempted manipulations of the published price indices have been disciplined.
- The company has a clear code of conduct in place for reporting price information.
- All trade data reporting is done by an entity within the company that does not have a financial interest in the published index (preferably the chief risk officer).
- The company is cooperating fully with any government agency investigating its past price reporting practices.

Chapter IV: Spot Gas Prices Were Not the Product of a Well Functioning Competitive Market—They Should be Replaced for the California Refund Proceeding

In this and previous chapters of this Report, Staff concludes that California spot gas prices were artificially high due to market dysfunctions, illiquidity, misreporting, and a rupture causing an abnormal pipeline capacity shortage. The spot gas prices reflected extraordinary basis differentials that far exceeded the cost of transportation and reached levels that would never have been sustained in a competitive market. While some portion of these price levels reflected legitimate scarcity, we cannot calculate the portion attributable to scarcity alone. These inflated gas prices were used in the California Refund

Proceeding to compute clearing prices for the entire electric spot power market. While there is no way to precisely replicate the level that spot gas prices would have reached in a competitive market, Staff recommends the use of producing-area prices plus transportation as a proxy for competitively derived gas prices in computing the market-clearing prices in the California Refund Proceeding. Over the 9-month refund period, Staff's proposal would reduce gas costs used in the refund formula by $7.03 in southern California and $4.18 in northern California, or about $5.60 on average.

Many generators paid these distorted gas prices and fundamental fairness dictates that they be able to recover these costs. Accordingly, Staff also recommends that generators be made whole for the spot gas prices they paid, but that this recovery be on a dollar-for-dollar basis and not part of the market-clearing price.

Staff's proposal would increase the level of the refunds for California.

Chapter V: Spot Power Prices Adversely Affected Long-Term Power Prices

The vital link between the spot price and forward price for a commodity is the ability to store that commodity. In essence, someone can meet future needs by purchasing the commodity now and storing it for future consumption. As a result, the forward price that someone is willing to pay will approximate the cost of purchasing plus the carrying cost involved with stockpiling. Since the feasibility of storing electricity is very limited, we

would expect to see little or no relationship between spot electric prices today and the forward price of electricity. Instead, forward prices should mostly reflect a buyer's expectations of prices in the future. Since natural gas is the marginal fuel in the West, forward gas prices should, in large part, explain forward power prices. Our analysis shows, however, that forward power prices negotiated during 2000-2001 in the western United States were significantly influenced by the then-current spot power prices. This tells us that the trauma of the dysfunctional spot power prices at that time so influenced buyers that they placed great weight on these prices in forming future expectations. The influence of spot prices on forward prices was the greatest for forward contracts with the shortest time to delivery (1-2 years) and varied by location. While Staff has found a statistically significant relationship, the magnitude of the impact is limited (that is, the impact of spot power prices on long-term power prices is clearly not dollar-for-dollar). Rather, a reduction of about one-third in the price of a 2-year forward contract would require a finding that spot power prices were three times above the just and reasonable level.

* * *

Developments in the Investigation Since August 13, 2002

Since the Initial Report was issued, five companies (Dynegy, AEP, Williams, CMS, and El Paso) have admitted that their employees provided false data

to the Trade Press.[2] On December 2, 2002, the Office of the United States Attorney in Houston indicted a former vice president of El Paso Energy on charges of false reporting and wire fraud in connection with his reporting of false trades to *Inside FERC* on November 30, 2001. These false trades were to be part of the calculation for the December 2001 monthly price index for the Sumas trading point at the U.S.-Canada border.

On December 18, 2002, the CFTC announced that it had reached a $5 million settlement with Dynegy and West Coast Power LLC. The settlement stated that Dynegy had "knowingly submitted false information to the reporting firms in an attempt to skew those indexes to Dynegy Marketing & Trades' financial benefit."

On January 26, 2003, Michelle Valencia, a former senior trader at Dynegy, was indicted on federal charges of giving false data to *Inside FERC* by the Office of the United States Attorney in Houston. She was charged with three counts of false reporting under the Commodity Exchange Act as well as four counts of wire fraud. She pleaded not guilty.

On October 22, 2002, Staff sent a data request to the 10 largest natural gas marketers and asked a series of questions regarding their past reporting practices, any internal procedures or controls they

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[2] The El Paso admission came in response to Staff's October 22, 2002 Data Request in Docket No. PA02-2 regarding the price reporting practices of the largest natural gas marketers in the United States.

had in place, any changes they made in those procedures, and any investigations they had in progress. Staff required those companies to investigate whether they had misreported data to the Trade Press and to provide data on actual trades and reported data so that Staff could check the accuracy of those reports. Staff also investigated reporting practices of the five companies that admitted that some of their employees provided false data to the Trade Press.

* * *

manipulation. The traders provided false data in order to (1) offset the perceived dominance of Enron's input to the process, (2) benefit traders' own positions or that of their trading desk, and (3) offset the inaccuracies that other companies were reporting.

Moreover, it is clear that the traders understood the process the Trade Press used to try to filter out false data and drew on that understanding to manipulate prices by constructing phony counterparties and by keeping their false data within the range of trading, only reporting numbers that favored their position (i.e., traders that wanted to see a high price only reported high-priced trades or inflated volumes on those trades).

Dynegy

On September 25, 2002, Dynegy announced it had discovered that 15 of its employees had engaged in reporting false data to the Trade Press. Of those, seven were fired, four were given the opportunity

to resign, and four were otherwise disciplined by the company. Dynegy interviewed all of its employees who were involved in reporting trade data to the Trade Press. The results of the interviews indicated that for a number of years the Dynegy trading desks systematically reported false data to the Trade Press. Dynegy states that there is no evidence of a conspiracy among the trading desks or between natural gas and power traders, that it had no systematic method in place for reporting trading information to the Trade Press, and that it has moved the reporting function to its risk management group.

The employees who provided false or inaccurate data to the Trade Press reported both monthly (*Inside FERC* and NGI) and daily indices (*Gas Daily*). In their reports to the monthly indices, they fabricated trades to come to a predetermined average. For the daily indices, the main method of manipulation was inflating volumes of trades.

Many of the traders stated that they felt pressure from the heads of the trading desks to report inflated volumes or prices that benefited the desk's position. One trader reported that the heads of the trading desks would instruct traders to report transactions that had not actually taken place. Another trader said the desk head told him he had to inflate volumes and report false prices. The trader stated that sometime in 2000 he was told by his boss that "this is how the game is played and you need to play it too." The trader went on to say that on one occasion, he took his trading report to his boss, who "told him to go back and do the report

again, make the volume 2 or 3 times greater and make the price range higher or lower" (he could not remember which).

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employee instructing other employees to submit false trades in order to serve as counterparty so the manipulation could not be detected by the Trade Press.

Staff also found evidence that a Dynegy trader and a trader at another company coordinated their numbers in order to report offsetting trades. In one case, for example, the Dynegy trader indicates an attempt to move the price at one trading point (Malin) down, and therefore only reported the low trades to *Inside FERC* (in the range of $12 to $12.50/MMBtu) that occurred during bid week. The other trader indicated that its actual trades were around $14/MMBtu.

In another example, the Dynegy trader and the other trader are coordinating their data reporting to *Inside FERC* for bid week at Malin and PG&E citygate—two significant natural gas trading points in the western United States. In both cases, the traders are discussing coordinating their reporting to ensure that their false numbers are included in the index calculation.

On December 18, 2002, the CFTC issued an Order saying that it had reached a $5 million settlement with Dynegy and West Coast Power LLC. The Order found that Dynegy had "knowingly submitted false information to the reporting firms

in an attempt to skew those indexes to Dynegy Marketing & Trades' financial benefit."

On January 26, 2003, Michelle Valencia, a former senior trader at Dynegy, was indicted on federal charges of giving false data to *Inside FERC* by the Office of the United States Attorney in Houston. She was charged with three counts of false reporting under the Commodity Exchange Act as well as four counts of wire fraud. She pleaded not guilty.

On January 27, 2003, Dynegy issued the following statement:

> The former employee was one of seven dismissed by the company since Oct. 18, 2002, after an ongoing internal investigation, conducted by the Dynegy Board of Directors' Audit and Compliance committee in collaboration with independent counsel, discovered circumstances indicating that inaccurate information regarding natural gas trades was reported to various energy industry publications. In addition, Dynegy has disciplined seven other employees for their involvement in this activity.[5]

Dynegy further stated that "[t]he past actions by these employees were in violation of the company's policies as outlined in its Code of Business Conduct" and that it was "committed to fully

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[5] Dynegy press release, January 27, 2003. www.dynegy.com.

cooperating with all ongoing investigations into these matters."

AEP

On October 9, 2002, AEP announced that it had "dismissed five employees involved in natural gas trading and marketing after the company determined that they provided inaccurate price information for use in indexes compiled and published by the trade publications."[6] The inaccurate price information referred to in the October 9, 2002 announcement was for the Gulf Coast region. In response to the Staff investigation, AEP officials explained that the traders claimed to have been providing false information in order to counteract the false information being provided by marketers and traders at other companies.

On October 4, 2002, AEP began an internal investigation of its trade data reporting to the Trade Press. AEP states that it initiated the investigation in response to the September 25 revelation by Dynegy that some of its employees had reported false data to the Trade Press. AEP found evidence indicating that some of its employees had submitted false data to the Trade Press during the period from 1998 to 2002.

The traders claimed to have been instructed by their boss (the head of the trading desk) to adjust the prices and volumes of trades they had made

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[6] AEP press release, October 9, 2002.

and, in some cases, to report trades that never occurred. AEP claims that the traders indicated that they were doing this because they believed it was common practice in the industry, so their false reports were only intended to counteract false information reported by counterparties.

The traders were asked how they would know how much to manipulate the numbers they reported so as to offset what they perceived the other companies were reporting, if these companies were presumably reporting simultaneously. The traders responded that they had a feel (based on buys and sells) for the way in which the market was headed. AEP did not ask the traders whether they tried to influence the index in order to benefit their own positions. However, they did ask the traders if they ever provided information that they knew in advance would be detrimental to their trading positions, and each indicated they had not.

AEP states that prior to October 2002, there was no process in place for gathering or reporting data to the Trade Press. Since its internal investigation, AEP has instructed all traders not to provide any data to the Trade Press. All trade data will go directly to the head of the Market Risk Oversight Group, who will verify that the data are accurate and then submit the data to the appropriate publications as necessary.

AEP states that it is continuing its internal investigation and cooperating with all relevant regulatory agencies (including FERC, the CFTC, and the SEC) as well as the U.S. Department of Justice. AEP further states that it has moved the

market data reporting function from the trading desks to the risk management office.

Williams

On October 25, 2002, Williams announced it had learned that a few traders in its natural gas trading business provided inaccurate information regarding natural gas trades to an energy industry publication that compiles and reports index prices. Williams stated that the inaccuracies were discovered during an independent, internal review of its trading activities.

Williams hired an outside company to conduct an internal investigation of its price reporting. Williams' investigation of the West found no evidence that the daily data provided to *Gas Daily* over the phone were inaccurate. However, the investigation did find that the monthly data reported to *Inside FERC* were inaccurate. Specifically, it found that in a number of instances the volume of trades reported to *Inside FERC* exceeded the actual volume of Williams' trading activity.

In response to the Staff data request, Williams offers the following explanations for the discrepancies: (1) the belief that *Inside FERC* expected Williams to report not only transactions to which Williams was a party, but other transactions occurring during bid week; (2) the reported transaction dates do not necessarily correlate with dates in Williams' database; (3) the reported delivery points do not necessarily correlate with delivery points in Williams'

database; (4) ambiguities caused by *Inside FERC's* requirement that numbers be rounded; (5) the evolving nature of the *Inside FERC* form, which purported to narrow the categories of transactions about which information was sought over time; and (6) *Williams' traders' reporting of inaccurate information* (emphasis added).[7]

The review found that some Williams traders manipulated the data they provided to the *Inside FERC* spreadsheet. They stated that they were doing this because significant market players (Enron and El Paso) were submitting a great deal of false trade data that were outside the range of prices that were actually trading, and they were trying to offset this false reporting. In addition, they wanted to show the Trade Press that they were players in the market. The traders also claimed that everyone in the industry, as well as *Inside FERC,* knew that this activity was taking place. They further stated that they believed the Trade Press was able to ferret out the most egregious misreporting and arrive at generally accurate priced indices. Williams has stopped reporting market price data to the Trade Press.

Williams did, however, find evidence of deliberate attempts to manipulate the published price indices in the Northeast. In each case, Williams found recorded telephone conversations indicating that editors of the Trade Press were questioning the accuracy of the trades reported by Williams' traders.

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[7] December 13 Response at 5.

In one case, a reporter from *Gas Daily* indicates that there were very few reported trades for that trading point, so the trades reported by Williams changed the index by up to 10 cents per MMBtu. The reporter from *Gas Daily* indicates that he was getting numerous complaints about the published index price and requests counterparty information so he can cross-check Williams' reported numbers, but the Williams trader refuses to provide counterparties due to confidentiality concerns.

In another case, a trader is asked by an editor from *Inside FERC* to provide counterparties for the reported transactions that are on the high end of the reported range and appear to be questionable. The trader makes up counterparties, but when the editor cross-checks with the reported counterparties, they deny being involved in the transactions.

In addition, an analysis of the financial positions of the Williams trading desks indicates that the trading desk profited from the movement of the prices.

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El Paso analyzed the accuracy of its reported data for its Western trading desk by comparing what was reported to the Trade Press with the actual deals captured in its information system for 728 fixed-price trades that took place between October 2000 and December 2001. El Paso found that approximately 80 percent of the transactions they analyzed were perfectly matched, meaning the price and volume reported were exactly the same

as the actual price and volume. Of the 20 percent (145 trades) that were not perfect matches, 23 reported transactions had the same price but a volume different from the actual transaction. El Paso explains that 115 of the remaining 122 trades were within 5 percent of the high and low trading range of the NYMEX during the 3-day period comprising 2 business days prior to, and the day of, the NYMEX settlement for each particular month, plus the published basis index for that month at a particular pricing location.

An analysis of El Paso's reporting for the rest of the country (the Northeast, Mid-Continent, and Gulf trading desks) shows far less accuracy in the reporting than in the West. As shown in Table III-1, the percentage of exact matches between actual trades and reported trades was 1.2 percent, 1.0 percent, and 0.5 percent for the Northeast, Mid-Continent, and Gulf trading desks, respectively. That is, for these regions, approximately 99 percent of the reported trades did not represent actual trades conducted by El Paso.

The volumes of the trades are also shown in Table III-1. For these three trading desks for the period July 2000 through December 2001, El Paso traded 640,568,790 MMBtu of fixed-price physical gas. For illustration, if the average price of the gas were $4/MMBtu for the period, then the value of the gas would be approximately $2.5 billion. So, El Paso misreported 99 percent of the prices on trades worth over $2 billion. In addition, as discussed earlier, the published indices are the basis for billions of dollars of financial derivative contracts

as well as physical and financial electricity contracts.

On January 13, 2003, El Paso updated its disclosures regarding price reporting to the Office of the United States Attorney in Houston. El Paso disclosed that it had found further instances of inaccurate reporting to the trade publications. On January 16, 2003, representatives from El Paso and the outside counsel performing the investigation briefed Commission Staff on its findings.

The investigation uncovered evidence that indicated there was systematic price manipulation occurring at El Paso. Specifically, prior to October 2000, El Paso reported data according to its "book bias." Staff understands that "book bias" refers to El Paso's trading position. In other words, in reporting according to the book bias, if El Paso had a long position it would report high prices and if El Paso had a short

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In October 2000, El Paso reported accurate numbers but the evidence indicates that El Paso desk heads, traders, and management considered whether to continue reporting accurate numbers or go back to reporting the book bias. The evidence shows that many of the traders, desk heads, and managers recommended going back to reporting the book bias. The data in Table III-1 strongly suggest that for those regions, El Paso did indeed go back to reporting its book bias for the period from November 2000 to December 2001.

El Paso states that it has stopped reporting trading information to the Trade Press.

Staff Reaction to the Admissions of False Reporting

Staff expressed concerns about the accuracy of the published price indices in its Initial Report. At that time we had no conclusive evidence that anyone had actually manipulated the published price indices. We argued that, due to the generic problems with the price reporting process and problems specific to the California Border gas indices, many companies had the incentive and ability to manipulate the indices. The admissions (described above) by five significant energy trading companies (Dynegy, AEP, Williams, CMS, and El Paso) confirm our concerns. Particularly troubling is the common theme that because everyone knew that everyone else was manipulating the indices by reporting false prices and volumes, it was somehow acceptable and even necessary for this to take place. Whether the intent was to influence an index in order to favor its positions or to somehow offset the false information being provided by others, the traders of these companies were deliberately manipulating the published price indices by providing false data to the Trade Press. In addition, in many cases the heads of the trading desks were aware of the manipulations; in some cases, they were orchestrating the manipulations.

Many traders said they were attempting to manipulate the index prices in order to offset the attempts at manipulation by others. The AEP traders were asked if they ever provided information that they knew in advance would be

detrimental to their trading position, and each indicated they had not. The obvious followup question, which was not asked by AEP (or at least not reported by AEP), is whether they ever provided information that they knew in advance would be good for their trading position. In general, the traders from the companies that

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companies were reporting, and (4) replicate the prices they perceived to be the true range and average of the market. Staff concludes that, at least in some cases, the false reporting was done to favor the traders', desks', or companies' financial position. In fact, the CFTC has concluded that Dynegy "knowingly submitted false information to reporting firms in order to skew those indices to Dynegy Marketing."

In some cases, the traders understood the process the Trade Press used to try to filter out false data and drew on that understanding to manipulate the prices by constructing phony counterparties and keeping the false data within the range of trading, but only reporting numbers that favored their position (i.e., traders that wanted to see a low price only reported low trades or inflated volumes on those trades). In some cases the traders claim they were unsure of what the Trade Press was looking for, so they would report a mix of real trades, observed trades, and fabricated trades that reflected their sense of market conditions.

Duke Energy Trading and Marketing

Duke Energy Trading and Marketing (Duke) performed an analysis of the correlation between the data reported by its Salt Lake City office (West trading desk) to the Trade Press and the actual trade data recorded in Duke's database for its western United States transactions. The analysis found that for monthly transactions, 95 percent of the reported trades matched the recorded trade on price, 93 percent matched on volume, and 92 percent matched on both price and volume. For daily transactions reported to the Trade Press, 88 percent of the reported trades matched the recorded trade on price, 82 percent matched on volume, and 78 percent matched on both price and volume. Stated another way, 8 percent of the reported monthly trades were inaccurate in terms of price, volume, or both, and 22 percent of reported daily trades were inaccurate in terms of price, volume, or both.

Duke interviewed its Salt Lake City traders to try to understand why there would be occasions when the recorded trade and the reported trade did not match completely. The reasons offered by the traders included (1) some small-volume trades were excluded from the reporting, (2) some trades occurred after the office's reporting deadline of 1:00 p.m. (Mountain Time), (3) the inadvertent failure to attach a list of online trades to the form that was faxed to the Trade Press of daily gas indices, (4) a trader's use of "an eyeball estimate" of a weighted average price for transactions that were reported on an aggregated basis, and (5) a trader's

reporting of an intracompany trade that was normally excluded. Duke concludes that for the vast majority of its trades, the Salt Lake City office reported its actual transactions to the Trade Press and there was no trader intent to manipulate the indices.

Duke did not perform a similar analysis for its eastern United States transactions because "DETM's Houston office reported to the Trade Press data for indicative transactions on broader market information than just its transactions."[11] That is, because Duke reported trades that it observed in the marketplace, it would not be expected that the reported data would correlate highly with recorded transaction data.

In addition, Duke provided Staff with electronic records of the spreadsheets it used to record the range of trades and volume-weighted average that it sent to *Gas Daily*. Examination of these spreadsheets shows that Duke calculated its volume-weighted average by taking the simple arithmetic average of its high and low trades for the day. Therefore, even if the Duke traders were trying to report accurately, they were not. Calculating a volume in this manner would not create a systematic bias in either direction (that is, tending to systematically overstate or understate the volume-weighted average); it provides another

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[11] Duke response to October 22 Staff Data Request, November 8, 2002.

source of inaccurate price data that is reflected in the published price indices.[12]

Duke did find significant inaccuracies in its reporting by the Mid-Continent, Gulf, and East trading desks, all located in Houston. Unlike traders in Salt Lake City, who reported on actual trades, the Houston traders reported their "sense of the market." The reporting was done by the physical gas traders, who generally received the data from management and the financial traders. The investigation has found that the management and financial traders sometimes biased the reported numbers to favor the trading desk's financial position.

Duke contends that by providing a "sense of the market," the traders thought they were providing what the Trade Press was looking for. Staff finds this argument unpersuasive because, for monthly prices, *Inside FERC* was explicit in its description of what it needed for its monthly index—actual fixed-price physical natural gas trades, not a "sense of the market" or basis or financial trades.

Duke states that most of the senior management in the Houston office, including all who participated in the inaccurate reporting, are no longer with the company.

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[12] If the distribution of prices was perfectly symmetric about the mean price, then the volume-weighted average would be equal to the simple average of the high and low trade. There is no reason to believe that would be the case with any regularity.

Duke states that its internal review indicates that the process of reporting natural gas market data to the Trade Press was informal. Duke claims that much of the informality was due to a general lack of understanding by Duke regarding what the various publications were seeking. Duke states that it has implemented new compliance procedures, under the direction of its chief risk officer, to ensure the accuracy of the data reported to the Trade Press.

Coral Energy

Coral Energy (Coral) interviewed all employees who provided data to the Trade Press. Coral has concluded that "the information it provided to the Trade Press accurately reflected then current market information." Coral described the type of information each trader (or other employee that provided trade data) gave the Trade Press. For both daily and monthly data, many Coral traders provided prices and volumes of (1) actual trades they had entered into, (2) trades they heard had taken place in the market, and (3) trades they had seen on trading platforms, including EOL.[13]

Coral does not address the seemingly obvious problem with reporting prices and volumes of trades that traders had "heard about" or "seen on electronic trading platforms." If a trade on EOL was witnessed by 100 traders, that does not mean the trade happened 100 times. However, if the

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[13] Some Coral traders only provided data on trades they had actually made.

industry practice was to report prices and volumes of trades that had been observed or heard about, then trading volumes were overstated and those trades made on EOL (the most widely observed trading platform) carried undue influence on the published price indices. Staff described the influence of EOL in the gas market price formation process, especially the Southern California Border daily market, in the Initial Report. The fact that traders were reporting trades they saw on EOL, sometimes misrepresenting them as their own trades, is another way EOL influenced the published indices. As stated throughout this chapter, many large traders used the same sort of "survey" reporting described by Coral.

* * *

Since October 2002, Mirant has implemented a formal process for reporting information on natural gas transactions to the Trade Press. Mirant now directs all calls or contacts from the Trade Press to a designated employee in the Risk Control department who is responsible for collecting responsive data from Mirant's actual trading records for submission to the publications. Moreover, since October 2002, records are being kept as to data requested and data submitted.

BP Energy Company

BP Energy Company (BP) provided records for trading data reported to the Trade Press by fax or e-mail. BP states that during the period in question, it provided natural gas prices and transaction data to the Trade Press on

spreadsheets containing information drawn or downloaded directly from the transaction support system. BP had a formal system in place for reporting transaction data to the Trade Press that included assigning the responsibility for reporting to a single trader with oversight and accountability from the trading managers.

BP could not provide records of the data reported to the daily publications over the phone. BP states that any information reported over the phone came directly from daily deal sheets. BP's internal price index reporting policy requires all discussions with third-party publications to be limited to the designated representative, with the trading managers serving as backups.

Reliant

For daily price reporting (*Gas Daily* and NGI), Reliant reported daily trading by fax to the Trade Press. Each day, traders would pass a daily worksheet around the trading floor and one or more traders would handwrite information on trading points with which they were knowledgeable. Some traders reported pricing for Reliant trades; others also reported other trades observed in the markets. At 2:30 p.m. each day, a Reliant analyst would fax the worksheet to the Trade Press. Reliant states, "[t]he worksheet was not reviewed by a supervisor or another employee before it was transmitted."[14]

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[14] Reliant response to October 22 Staff Data Request at 4.

Reliant used different monthly price reporting procedures at its various trading desks. It has almost no record of the West desk's reporting (it found a single spreadsheet from the Denver office). However, Reliant

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other times it was the simple average of the high and low trades. Some traders received phone calls, some called the Trade Press, and some faxed prices and volumes. Staff inspection of the faxes shows that there was no standardization of the data reported to the Trade Press. In some cases volumes and average prices were reported, some had individual trades, some showed basis differentials, and some were financial rather than physical deals. Because most of the reporting was done by phone, there are significant barriers to finding out what the traders actually reported to the Trade Press. As with *Inside FERC,* the editors of *Gas Daily* assert First Amendment protection, so there is no way to ascertain what they were told and their awareness of the extent of the manipulation. Moreover, the companies themselves were unable to re-create their daily reporting because (1) it was done by phone and the phone calls were not always recorded (even if they were recorded, it would take thousands of hours to listen to the recorded calls) and (2) the Trade Press denied companies' requests for their own data, citing confidentiality and First Amendment protection.

In short, the responses indicate that the reported price indices were based on data that were

confusing, inaccurate, misleading, and often false. Staff concludes that an accurate index could not have resulted from the data that were reported. In addition, because the Trade Press has not revealed their data, there is no way to verify the accuracy of the reported indices by comparing them with the data reported to the Trade Press.

Staff Attempts To Verify the Accuracy of the Reported Indices

As part of the investigation, Staff attempted to verify the accuracy of the reported price indices; however, there have been significant barriers to this process. First, in many cases the companies cannot reproduce the data they reported to the Trade Press for the reasons described above: daily reporting was done by phone, often on unrecorded lines; many traders reported their own trades along with those they observed in the market; and records of the reported data were not maintained because there was no formal process for reporting the data. In addition, the Trade Press has not revealed the data used to calculate the indices.

One of the issues that became apparent to Staff while investigating Enron and other energy traders is that they lack many business records that are essential when investigating allegations regarding trading activities. Because the companies have argued that their trading activities are not jurisdictional to FERC, CFTC, or SEC, many fail to keep records that would be required of a regulated company. For example, maintenance of phone tape recordings can be haphazard at these companies. Staff found evidence indicating that Enron had

received a legal opinion finding that their 4-month tape retention policy was not in compliance with FERC regulations. During the same time that Enron received this finding, they were reducing their retention to 30 days. Although the retention of phone tapes in the power industry is an accepted practice, the length of retention varies. Specifically, the lack of record keeping, especially recorded telephone conversations, made it difficult and, in some cases, impossible to verify the data provided by the companies to the Trade Press.

As described earlier in this chapter, Staff analyzed the trading data of six major gas purchasers in California and compared them to the published price indices. The analysis uses data submitted under Docket No. EL00-95 by David Reishus and Patrick Wang of Lexecon Inc. on behalf of five companies involved in that proceeding (Duke, Dynegy, Mirant, Reliant, and Williams). The database they used included spot transactions from six companies: Coral, Duke, Dynegy, Mirant, Reliant, and Williams. Staff found that for those six companies during that period, their fixed-price purchases were systematically lower than the published index prices (which are supposed to be based on that type of transaction only).[21]

Industrywide Reporting Issues

As described in the Initial Report, the industry relies on both daily and monthly natural gas price indices. The monthly price indices are based on

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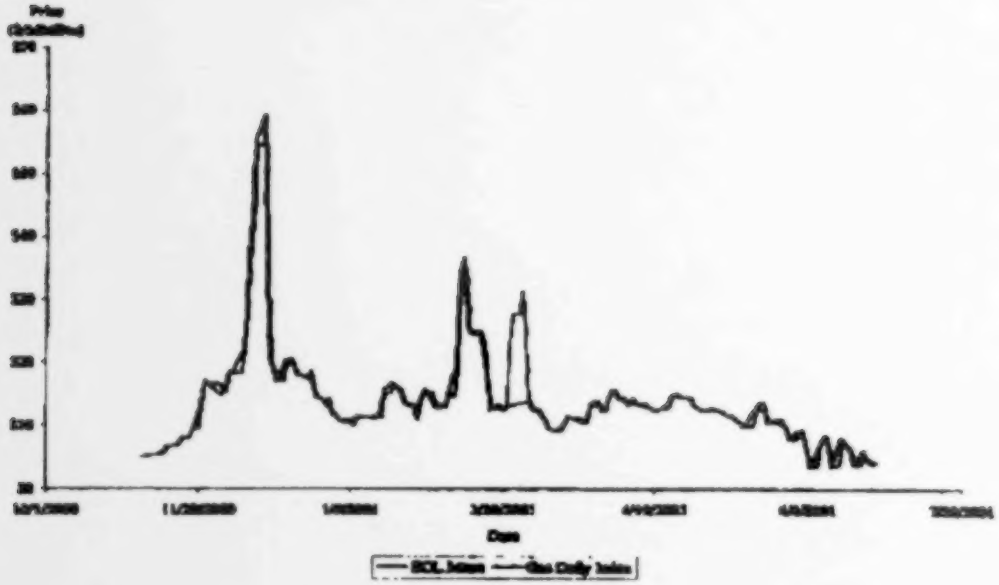
[21] See Table III-2 on page III-17.

fixed-price transactions occurring during bid week. During the course of the investigation, it became clear to Staff that transactions occurring during bid week do not give an accurate picture of the monthly natural gas trading activity. A number of large traders (e.g., Dynegy, AEP, and Williams) stated that they did very little fixed-price trading during bid week. They stated that they mainly traded indexed contracts or small fixed-price deals designed to fine tune their physical and/or financial positions for the month. Data provided from the large natural gas traders and marketers confirm this position. In fact, traders said that one of the reasons they fabricated the prices and volumes they provided to the Trade Press was that they had very few trades during bid week and they wanted to reflect their actual trading activity for the month. Another problem with reporting bid-week trades only is that

* * *

4. Traders used EOL for price discovery, so the price of off-EOL trades was influenced by EOL.

Figure III-1
SoCal Topock: EnronOnline and *Gas Daily* Index Value



As shown in Figure III-1, the *Gas Daily* price almost perfectly tracks the EOL price. In the Initial Report, Staff focused on one trading day, January 31, 2001. On that day, total trading volume at southern California Topock reported to *Gas Daily* was 6,766,000 MMBtu, which was the busiest trading point for that day. The total volume on EOL for next-day Topock gas for the day was 2,240,000 MMBtu. At the time of the Initial Report, Staff did not know the extent to which the reporting of trading volume was manipulated by the traders. The total volume of trading on EOL for the day (2,240,000 MMBtu) is actual trading verified by Staff. The total volume reported by *Gas Daily* (6,766,000 MMBtu) cannot be verified because *Gas Daily* has not revealed its data. Moreover, as described above, most companies spoke to *Gas Daily*'s editors over the phone and did

not keep records of what they reported. Staff suspects that of the 6,766,000 MMBtu reported by *Gas Daily*, much of it was based on trades observed on EOL in addition to the actual trades made on EOL. Finally, as noted in the Initial Report and discussed in Chapter II, more that 75 percent of the trading on EOL that day was with one trader from Reliant. Thus, the volume reported and the observed activity on EOL give the illusion of a much more liquid market than was actually present.

* * *

- El Paso Merchant Energy
- Williams
- Reliant
- Duke
- CMS
- Mirant
- Coral
- Sempra Energy Trading

At a minimum, these companies need to show the following:

- Those employees, including trading desk heads and managers, who participated in manipulations or attempted manipulations of the published price indices have been disciplined.

- The company has a clear code of conduct in place for reporting price information.
- All trade data reporting is done by an entity within the company that does not have a financial interest in the published index (preferably the chief risk officer).
- The company is fully cooperating with any government agency investigating its past price reporting.

Conclusion

The process for reporting natural gas price indices was fundamentally flawed and must be fixed. Traders had the ability and incentive to manipulate the published indices and they did so. Given the degree of systematic manipulation described in this chapter, the published indices could not possibly be accurate based solely on the publishers' editorial judgement, the traders' feel for the market, or the hope that competing traders could offset each other's false reporting.

Staff began the investigation looking for evidence of energy price manipulation in the West. Staff found evidence of manipulation (direct and indirect) of the published natural gas price indices at significant trading points all over the United States—the U.S.-Canada border in Washington (El Paso), Oregon and San Francisco (Dynegy), the Gulf Coast (AEP), the Great Lakes (CMS), the Northeast (Williams), the Henry Hub in Louisiana (Enron), and the Southern California-Arizona Border (Enron and Reliant).

FERC REPORT, CHAPTER 3

III. MANIPULATIONS OF PUBLISHED NATURAL GAS PRICE INDICES

On August 13, 2002, the Commission made publicly available Staff's Initial Report of its investigation in Docket No. PA02-2-000. Staff inquired into the characteristics of publicly reported price data, including natural gas spot prices at California delivery points that are used in the California refund proceeding. Staff found significant problems with published price indices and specific issues with respect to California delivery point spot prices, as described below:[1]

- The Commission cannot independently verify the published price data (primarily because the source of the publications' raw data has not been disclosed due to publishers' confidentiality concerns about revealing source data).
- Undetected errors may exist because trade publications reporting spot and forward prices do not employ statistically valid sampling procedures or a systematic, formal verification procedure.
- Market participants have significant incentives to manipulate spot market prices reported to the reporting firms because natural gas is the fuel input for the electricity generators that set the market price in California.

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[1] These findings are summarized in the Initial Report on pp. 3-5 and 34; a detailed discussion is provided on pp. 35-57.

- Wash trades may have an adverse effect on reported price data.
- EnronOnline (EOL), Enron's former electronic trading platform, was a significant source of price discovery and formation and was potentially susceptible to manipulation by market participants, which could affect the published price indices.

Based on these findings, Staff concluded that published California delivery point natural gas spot prices are not sufficiently reliable to be used in the California refund proceeding for purposes of calculating the MMCP and resultant refunds. A detailed discussion of the alternative proposal is in Chapter IV.

Developments in the Investigation Since August 13, 2002

Since the Initial Report was issued, five companies (Dynegy, AEP, Williams, CMS, and El Paso) have admitted that their employees provided false data to the Trade Press.[2] On December 2, 2002, the Office of the United States Attorney in Houston indicted a former vice president of El Paso Energy on charges of false reporting and wire fraud in connection with his reporting of false trades to *Inside FERC* on November 30, 2001. These false trades were to be part of the calculation for the

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[2] The El Paso admission came in response to Staff's October 22, 2002 Data Request in Docket No. PA02-2 regarding the price reporting practices of the largest natural gas marketers in the United States.

December 2001 monthly price index for the Sumas trading point at the U.S.-Canada border.

On December 18, 2002, the CFTC announced that it had reached a $5 million settlement with Dynegy and West Coast Power LLC. The settlement stated that Dynegy had "knowingly submitted false information to the reporting firms in an attempt to skew those indexes to Dynegy Marketing & Trades' financial benefit."

On January 26, 2003, Michelle Valencia, a former senior trader at Dynegy, was indicted on federal charges of giving false data to *Inside FERC* by the Office of the United States Attorney in Houston. She was charged with three counts of false reporting under the Commodity Exchange Act as well as four counts of wire fraud. She pleaded not guilty.

On October 22, 2002, Staff sent a data request to the 10 largest natural gas marketers and asked a series of questions regarding their past reporting practices, any internal procedures or controls they had in place, any changes they made in those procedures, and any investigations they had in progress. Staff required those companies to investigate whether they had misreported data to the Trade Press and to provide data on actual trades and reported data so that Staff could check the accuracy of those reports. Staff also investigated reporting practices of the five companies that admitted that some of their employees provided false data to the Trade Press.

In short, the investigations and responses to the data requests indicate that the companies had little, if any, formal procedures in place to ensure the accuracy of the data reported to the Trade Press. In fact, in some cases there were systematic efforts to bias the data reported to the Trade Press for the purpose of trying to offset the perceived dominance of Enron's input to the process, trying to benefit traders' own positions or that of their trading desk, and trying to offset the inaccuracies that other companies were reporting. In addition, even when these companies claim they were not trying to influence the published indices, Staff uncovered cases in which the data were inaccurate due to unstructured or nonexistent processes for reporting, such as calculating a "volume-weighted average" by taking the simple arithmetic average of the high and low trades, making up trades in order to come up with an average that was the midpoint of the traders' perceived range, and entering fictitious trades (both prices and volumes) in order to replicate what they had seen on EOL or other platforms.

Platts *Gas Daily* and Platts *Inside FERC* were the trade publications publishing the indices that were most widely used in the industry. *Gas Daily* published a daily price index and *Inside FERC* published a monthly index. *Gas Daily* published three daily natural gas prices for more than 100 pricing points: the absolute range, the common range, and the midpoint of the common range. Through interviews (primarily via telephone or fax) with natural gas market participants such as traders, end users, and producers, Platts reporters

collect prices, dates, volumes, and sometimes counter parties for individual deals. According to Platts, it then sorts prices from low to high, looks for "outliers" (those prices that are greater than two standard deviations from the mean), cross-checks with counterparties, and calculates descriptive statistics (e.g., mean, median, variance, and range). The index price is based on this analysis.

Inside FERC published monthly price indices based on bid-week fixed-price transactions for gas flowing the entire next month.[3] Rather than calling traders on the phone as was the case with *Gas Daily, Inside FERC* had a standardized spreadsheet on which traders were to enter prices, volumes, and locations for all fixed-price deals during bid-week. The traders e-mailed the spreadsheet to *Inside FERC,* whose editors performed an analysis similar to the one performed by editors of *Gas Daily* to arrive at the published index.

The investigation and responses to Staff requests for information on the data gathering process of the Trade Press were also documented in the Initial Report. However, the Trade Press asserted First Amendment protection from revealing data, so

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[3] A fixed-price transaction is a bilateral deal based on an agreed upon price rather than a price based on an index or a basis differential off an index. Generally, a bid week begins 5 working days prior to the last trading day of the month, but it can vary across regions of the country. A bid-week price is the volume-weighted measure of gas prices for the following month done during the pipeline nomination period.

Staff was unable to get a complete picture of the process. After the Initial Report was completed, Staff collected pertinent information from the companies that provide data to the Trade Press. Having seen the process from the other side, it is clear that the information being sent to the Trade Press was subject to manipulation and the companies claim there was confusion among the traders regarding what the Trade Press was looking for (i.e., all trades, only fixed-price trades, observed trades, "feel for the market"), particularly in the case of daily indices. However, even when it was clear as to what the Trade Press was looking for (i.e., the *Inside FERC* spreadsheet), the traders often sent false data.

Staff also found that traders routinely complained to the Trade Press about the accuracy of the indices and that certain large players were, in fact, manipulating the indices. Traders report that large players leaned on the Trade Press to change indices after they were calculated. Further, some companies wrote letters to the Trade Press complaining about the methodology (e.g., not requiring counterparties from everyone), noting problems, and identifying irregularities. The editors of the Trade Press, therefore, were on notice that some of the data they were receiving could have been false. As such, sometimes they would have had to rely on their judgment and feel for the market rather than using a strict calculation.

Company-Specific Reporting Practices

As stated above, five companies (Dynegy, AEP, Williams, CMS, and El Paso) have admitted that their employees provided false data to the Trade Press, including *Gas Daily* and *Inside FERC*. Some of the companies state that they have taken disciplinary actions against those employees involved in false reporting, including termination of employment and forced resignation.

This section describes the price reporting practices for each of the five companies that have admitted to providing false data to the Trade Press. Although the details vary somewhat for each company, there are common themes throughout. The reporting was done by the trading desks and the traders themselves. There was little, if any, internal oversight by management or desk heads. In fact, in some cases, the desk heads and management were orchestrating the price manipulation. The traders provided false data in order to (1) offset the perceived dominance of Enron's input to the process, (2) benefit traders' own positions or that of their trading desk, and (3) offset the inaccuracies that other companies were reporting.

Moreover, it is clear that the traders understood the process the Trade Press used to try to filter out false data and drew on that understanding to manipulate prices by constructing phony counterparties and by keeping their false data within the range of trading, only reporting numbers that favored their position (i.e., traders

that wanted to see a high price only reported high-priced trades or inflated volumes on those trades).

Dynegy

On September 25, 2002, Dynegy announced it had discovered that 15 of its employees had engaged in reporting false data to the Trade Press. Of those, seven were fired, four were given the opportunity to resign, and four were otherwise disciplined by the company. Dynegy interviewed all of its employees who were involved in reporting trade data to the Trade Press. The results of the interviews indicated that for a number of years the Dynegy trading desks systematically reported false data to the Trade Press. Dynegy states that there is no evidence of a conspiracy among the trading desks or between natural gas and power traders, that it had no systematic method in place for reporting trading information to the Trade Press, and that it has moved the reporting function to its risk management group.

The employees who provided false or inaccurate data to the Trade Press reported both monthly (*Inside FERC* and NGI) and daily indices (*Gas Daily*). In their reports to the monthly indices, they fabricated trades to come to a predetermined average. For the daily indices, the main method of manipulation was inflating volumes of trades.

Many of the traders stated that they felt pressure from the heads of the trading desks to report inflated volumes or prices that benefited the desk's position. One trader reported that the heads of the trading desks would instruct traders to report

transactions that had not actually taken place. Another trader said the desk head told him he had to inflate volumes and report false prices. The trader stated that sometime in 2000 he was told by his boss that "this is how the game is played and you need to play it too." The trader went on to say that on one occasion, he took his trading report to his boss, who "told him to go back and do the report again, make the volume 2 or 3 times greater and make the price range higher or lower" (he could not remember which).

The trader claimed that he reported inaccurate numbers for 2 months and then stopped doing so, and left the company shortly thereafter.

In addition, some of the fired and disciplined Dynegy traders stated that the way in which they reported price data was similar to the way in which it was done at their previous companies and they considered it to be "common practice in the industry."

Many traders reported that they provided a "survey" to *Inside FERC* and *Gas Daily,* whereby they found the "average" of the range of trades they observed and/or participated in and then constructed false trades to come up with the average. One trader stated that this was the same way in which he had reported prices when he was employed by another large energy trading company. Many of the Dynegy traders stated that they submitted bogus data (particularly to *Inside FERC)* because there were very few fixed-price trades, which is what *Inside FERC* used for its monthly index. In particular, one trader stated

that it was "widely known" that "there were no fixed-price physical deals at some locations." In addition, traders claim that the heads of the trading desks were aware of this and pressured traders to report bogus fixed-price trades in order for Dynegy's numbers to be reflected in the indices. Many of the traders indicated that *Inside FERC* had to know what it was getting from the traders—that is, data on trades that never occurred. Specifically, one trader claimed that he provided his trades along with what he saw in the market to *Inside FERC* and that, despite the fact that the *Inside FERC* spreadsheet specifically asked for actual fixed-price trades made by the companies, "*Inside FERC* knew what they were getting."

Another Dynegy trader stated that he reported trades he saw on EOL or the IntercontinentalExchange (ICE) to both *Gas Daily* and *Inside FERC* because they "wanted to report more than a deal or two," and to show the marketplace that they were a player in it. Another trader stated that he felt implicit pressure to inflate volumes because of the "fear of bad ranking."[4]

Another Dynegy employee admitted to overreporting volumes because of expectations to do so or in response to prices that did not seem fair (e.g., those seen on EOL). This employee claimed to "make false reports in order to counteract false

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[4] Staff has not determined whether the ranking refers to the ranking of trading companies by volume of trading or the ranking of individual traders or desks within the company.

reports made by others" and said the reason for this practice was that this was "as much as a general attitude that we needed to fight back" because "the market got ridiculous with Enron." The investigation uncovered evidence of one employee instructing other employees to submit false trades in order to serve as counterparty so the manipulation could not be detected by the Trade Press.

Staff also found evidence that a Dynegy trader and a trader at another company coordinated their numbers in order to report offsetting trades. In one case, for example, the Dynegy trader indicates an attempt to move the price at one trading point (Malin) down, and therefore only reported the low trades to *Inside FERC* (in the range of $12 to $12.50/MMBtu) that occurred during bid week. The other trader indicated that its actual trades were around $14/MMBtu.

In another example, the Dynegy trader and the other trader are coordinating their data reporting to *Inside FERC* for bid week at Malin and PG&E citygate—two significant natural gas trading points in the western United States. In both cases, the traders are discussing coordinating their reporting to ensure that their false numbers are included in the index calculation.

On December 18, 2002, the CFTC issued an Order saying that it had reached a $5 million settlement with Dynegy and West Coast Power LLC. The Order found that Dynegy had "knowingly submitted false information to the reporting firms

in an attempt to skew those indexes to Dynegy Marketing & Trades' financial benefit."

On January 26, 2003, Michelle Valencia, a former senior trader at Dynegy, was indicted on federal charges of giving false data to *Inside FERC* by the Office of the United States Attorney in Houston. She was charged with three counts of false reporting under the Commodity Exchange Act as well as four counts of wire fraud. She pleaded not guilty.

On January 27, 2003, Dynegy issued the following statement:

> The former employee was one of seven dismissed by the company since Oct. 18, 2002, after an ongoing internal investigation, conducted by the Dynegy Board of Directors' Audit and Compliance committee in collaboration with independent counsel, discovered circumstances indicating that inaccurate information regarding natural gas trades was reported to various energy industry publications. In addition, Dynegy has disciplined seven other employees for their involvement in this activity.[5]

Dynegy further stated that "[t]he past actions by these employees were in violation of the company's policies as outlined in its Code of Business Conduct" and that it was "committed to fully

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[5] Dynegy press release, January 27, 2003. www.dynegy.com.

cooperating with all ongoing investigations into these matters."

AEP

On October 9, 2002, AEP announced that it had "dismissed five employees involved in natural gas trading and marketing after the company determined that they provided inaccurate price information for use in indexes compiled and published by the trade publications." [6] The inaccurate price information referred to in the October 9, 2002 announcement was for the Gulf Coast region. In response to the Staff investigation, AEP officials explained that the traders claimed to have been providing false information in order to counteract the false information being provided by marketers and traders at other companies.

On October 4, 2002, AEP began an internal investigation of its trade data reporting to the Trade Press. AEP states that it initiated the investigation in response to the September 25 revelation by Dynegy that some of its employees had reported false data to the Trade Press. AEP found evidence indicating that some of its employees had submitted false data to the Trade Press during the period from 1998 to 2002.

The traders claimed to have been instructed by their boss (the head of the trading desk) to adjust the prices and volumes of trades they had made

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[6] AEP press release, October 9, 2002.

and, in some cases, to report trades that never occurred. AEP claims that the traders indicated that they were doing this because they believed it was common practice in the industry, so their false reports were only intended to counteract false information reported by counterparties.

The traders were asked how they would know how much to manipulate the numbers they reported so as to offset what they perceived the other companies were reporting, if these companies were presumably reporting simultaneously. The traders responded that they had a feel (based on buys and sells) for the way in which the market was headed. AEP did not ask the traders whether they tried to influence the index in order to benefit their own positions. However, they did ask the traders if they ever provided information that they knew in advance would be detrimental to their trading positions, and each indicated they had not.

AEP states that prior to October 2002, there was no process in place for gathering or reporting data to the Trade Press. Since its internal investigation, AEP has instructed all traders not to provide any data to the Trade Press. All trade data will go directly to the head of the Market Risk Oversight Group, who will verify that the data are accurate and then submit the data to the appropriate publications as necessary.

AEP states that it is continuing its internal investigation and cooperating with all relevant regulatory agencies (including FERC, the CFTC, and the SEC) as well as the U.S. Department of Justice. AEP further states that it has moved the

market data reporting function from the trading desks to the risk management office.

Williams

On October 25, 2002, Williams announced it had learned that a few traders in its natural gas trading business provided inaccurate information regarding natural gas trades to an energy industry publication that compiles and reports index prices. Williams stated that the inaccuracies were discovered during an independent, internal review of its trading activities.

Williams hired an outside company to conduct an internal investigation of its price reporting. Williams' investigation of the West found no evidence that the daily data provided to *Gas Daily* over the phone were inaccurate. However, the investigation did find that the monthly data reported to *Inside FERC* were inaccurate. Specifically, it found that in a number of instances the volume of trades reported to *Inside FERC* exceeded the actual volume of Williams' trading activity.

In response to the Staff data request, Williams offers the following explanations for the discrepancies: (1) the belief that *Inside FERC* expected Williams to report not only transactions to which Williams was a party, but other transactions occurring during bid week; (2) the reported transaction dates do not necessarily correlate with dates in Williams' database; (3) the reported delivery points do not necessarily correlate with delivery points in Williams'

database; (4) ambiguities caused by *Inside FERC's* requirement that numbers be rounded; (5) the evolving nature of the *Inside FERC* form, which purported to narrow the categories of transactions about which information was sought over time; and (6) *Williams' traders' reporting of inaccurate information* (emphasis added).[7]

The review found that some Williams traders manipulated the data they provided to the *Inside FERC* spreadsheet. They stated that they were doing this because significant market players (Enron and El Paso) were submitting a great deal of false trade data that were outside the range of prices that were actually trading, and they were trying to offset this false reporting. In addition, they wanted to show the Trade Press that they were players in the market. The traders also claimed that everyone in the industry, as well as *Inside FERC,* knew that this activity was taking place. They further stated that they believed the Trade Press was able to ferret out the most egregious misreporting and arrive at generally accurate priced indices. Williams has stopped reporting market price data to the Trade Press.

Williams did, however, find evidence of deliberate attempts to manipulate the published price indices in the Northeast. In each case, Williams found recorded telephone conversations indicating that editors of the Trade Press were questioning the accuracy of the trades reported by Williams' traders.

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[7] December 13 Response at 5.

In one case, a reporter from *Gas Daily* indicates that there were very few reported trades for that trading point, so the trades reported by Williams changed the index by up to 10 cents per MMBtu. The reporter from *Gas Daily* indicates that he was getting numerous complaints about the published index price and requests counterparty information so he can cross-check Williams' reported numbers, but the Williams trader refuses to provide counterparties due to confidentiality concerns.

In another case, a trader is asked by an editor from *Inside FERC* to provide counterparties for the reported transactions that are on the high end of the reported range and appear to be questionable. The trader makes up counterparties, but when the editor cross-checks with the reported counterparties, they deny being involved in the transactions.

In addition, an analysis of the financial positions of the Williams trading desks indicates that the trading desk profited from the movement of the prices.

CMS

On November 4, 2002, CMS announced that it was conducting an internal review of the natural gas trade information provided to the Trade Press by two subsidiaries, CMS Marketing Services and Trading and CMS Field Services. CMS stated that a preliminary analysis indicated some employees provided inaccurate data to the Trade Press. CMS further stated that it would take appropriate

disciplinary action and it would stop providing information to the Trade Press.

In its responses to Staff data requests, CMS stated that it had taken disciplinary action regarding seven employees (including firing four employees, three of whom were regional directors) following its inquiry into price reporting practices.

CMS hired an outside counsel who analyzed the accuracy of the trades submitted to *Inside FERC* from December 2000 to June 2002 for its monthly index. Of the 472 trades reported to *Inside FERC* for that period, there were 116 exact matches. The reasons for the 356 reported trades that did not have an exact match were: (1) reporting the sense of the market, (2) rounding off, (3) aggregation of small deals, and (4) reporting what they saw in the market.

The outside counsel interviewed gas traders and desk heads who reported CMS's trading information to the Trade Press. One trader stated that he perceived pressure from his desk head to report inaccurate prices (high or low) in order to affect the index price. The trader said he resisted the pressure, but on one occasion he did report false data in order to manipulate an index to favor the desk's position. According to the trader, during the winter of 2000-2001 the difference between the natural gas prices (basis differential) at two significant Midwestern trading points was unusually large. The trader's boss (the desk head) wanted him to narrow the basis differential between the two prices. The trader then reported

high prices for the lower one in order to narrow the spread between the two.

Another trader said that the same desk head asked him to create a spreadsheet with fictitious trades designed to narrow another basis differential. The trader claims that he did create such a spreadsheet to send to *Inside FERC* and e-mailed it to the desk head.

There are many financial products traded by energy companies that are based on the basis differential between two natural gas delivery points. Companies use financial swaps and other instruments to mitigate risks they face due to the differences in prices at various delivery locations. They also trade basis differentials in order to speculate on those differences. Because companies are taking positions based on the difference between two points, they can profit if they can affect the basis differential by moving one of the prices up and/or moving the other price down. Staff has seen examples of both. One method of manipulating indices in order to affect basis differentials is to simply make up prices, as was the case with CMS. Another way would be to only report those trades that favor their positions or inflate the volumes of those trades that favor their positions.

CMS has shut down its energy trading operation, thus it no longer reports market data to the Trade Press.

El Paso Merchant Energy

On November 8, 2002, El Paso Merchant Energy (El Paso) announced it found evidence that one of its employees had misreported trade data to the Trade Press. El Paso informed Staff that the employee refused to talk about the incident to company attorneys and resigned from the company on November 12. El Paso states that on November 30, 2001, an employee of *Inside FERC* questioned the accuracy of certain trade information submitted by that same El Paso employee.

On December 2, 2002, the Office of the United States Attorney in Houston indicted Todd Geiger, a former vice president of El Paso Energy, on charges of false reporting and wire fraud in connection with his reporting of false trades to *Inside FERC* on November 30, 2001 to be part of the calculation for the December 2001 monthly price index for the Sumas trading point at the U.S.-Canada border. On December 9, 2002, Mr. Geiger pleaded not guilty to the charges.

El Paso provided FERC Staff with recordings of telephone conversations between El Paso employees and an editor of *Inside FERC*. The tapes are telling in that the *Inside FERC* editor was trying to convince the El Paso traders to provide counterparties for all the trades they report in order to "true-up" the index. He explained that unless everyone provides counterparties, traders can submit false data with no way of being detected as long as the trades are not too far out of line with the market. He also

explained that once everyone knows that the other traders are reporting counterparties, everyone will know they must provide accurate data reflecting only fixed-price deals made during bid week.

El Paso analyzed the accuracy of its reported data for its Western trading desk by comparing what was reported to the Trade Press with the actual deals captured in its information system for 728 fixed-price trades that took place between October 2000 and December 2001. El Paso found that approximately 80 percent of the transactions they analyzed were perfectly matched, meaning the price and volume reported were exactly the same as the actual price and volume. Of the 20 percent (145 trades) that were not perfect matches, 23 reported transactions had the same price but a volume different from the actual transaction. El Paso explains that 115 of the remaining 122 trades were within 5 percent of the high and low trading range of the NYMEX during the 3-day period comprising 2 business days prior to, and the day of, the NYMEX settlement for each particular month, plus the published basis index for that month at a particular pricing location.

An analysis of El Paso's reporting for the rest of the country (the Northeast, Mid-Continent, and Gulf trading desks) shows far less accuracy in the reporting than in the West. As shown in Table III-1, the percentage of exact matches between actual trades and reported trades was 1.2 percent, 1.0 percent, and 0.5 percent for the Northeast, Mid-Continent, and Gulf trading desks, respectively. That is, for these regions,

approximately 99 percent of the reported trades did not represent actual trades conducted by El Paso.

The volumes of the trades are also shown in Table III-1. For these three trading desks for the period July 2000 through December 2001, El Paso traded 640,568,790 MMBtu of fixed-price physical gas. For illustration, if the average price of the gas were $4/MMBtu for the period, then the value of the gas would be approximately $2.5 billion. So, El Paso misreported 99 percent of the prices on trades worth over $2 billion. In addition, as discussed earlier, the published indices are the basis for billions of dollars of financial derivative contracts as well as physical and financial electricity contracts.

On January 13, 2003, El Paso updated its disclosures regarding price reporting to the Office of the United States Attorney in Houston. El Paso disclosed that it had found further instances of inaccurate reporting to the trade publications. On January 16, 2003, representatives from El Paso and the outside counsel performing the investigation briefed Commission Staff on its findings.

The investigation uncovered evidence that indicated there was systematic price manipulation occurring at El Paso. Specifically, prior to October 2000, El Paso reported data according to its "book bias." Staff understands that "book bias" refers to El Paso's trading position. In other words, in reporting according to the book bias, if El Paso had a long position it would report high prices and if El Paso had a short position it would report low

prices. That is, it was trying to manipulate the published price index in order to favor the company's financial position.

Table III-1. Price Reporting Summary, July 2000 - December 2001

	No. of Deals	Percent	Absolute Volume	Percent
Northeast				
Price in range but no deal match	368	84.8%	154,197,500	82.1%
Price equal to or less than 1%	40	9.2%	20,900,000	11.1%
Deal found but price and/or volume do not match	0	0.0%	0	0.0%
Deal price and volume match	**5**	**1.2%**	**3,487,500**	**1.9%**
	413	95.2%	178,585,000	95.1%
Price greater than 1% and equal to or less than 5%	15	3.5%	7,440,000	4.0%
Price greater than 5% and equal to or less than 10%	5	1.2%	1,550,000	0.8%
Price greater than 10%	1	0.2%	310,000	0.2%
	21	4.8%	9,300,000	4.9%

	No. of Deals	Percent	Absolute Volume	Percent
	434	100.0%	187,885,000	100.0%
Mid-Continent/ Midwest				
Price in range but no deal match	388	74.3%	211,827,000	77.9%
Price equal to or less than 1%	65	12.5%	31,407,000	11.6%
Deal found but price and/or volume do not match	7	1.3%	2,765,000	1.0%
Deal price and volume match	**5**	**1.0%**	**1,540,000**	**0.6%**
	465	89.1%	247,539,000	91.1%
Price greater than 1% and equal to or less than 5%	54	10.3%	23,382,000	8.6%
Price greater than 5% and equal to or less than 10%	3	0.6%	930,000	0.3%
Price greater than 10%	0	0.0%	0	0.0%
	57	10.9%	24,312,000	8.9%
	522	100.0%	271,851,000	100.0%

	No. of Deals	Percent	Absolute Volume	Percent
Texas/Gulf Coast/ Southeast				
Price in range but no deal match	1,065	81.5%	546,347,090	85.3%
Price equal to or less than 1%	94	7.2%	35,728,000	5.6%
Deal found but price and/or volume do not match	8	0.6%	2,140,700	0.3%
Deal price and volume match	**6**	**0.5%**	**1,590,000**	**0.2%**
	1,173	89.8%	585,805,790	91.5%
Price greater than 1% and equal to or less than 5%	114	8.7%	46,565,000	7.3%
Price greater than 5% and equal to or less than 10%	19	1.5%	8,198,000	1.3%
Price greater than 10%	0	0.0%	0	0.0%
	133	10.2%	54,763,000	8.5%
	1,306	100.0%	640,568,790	100.0%

Based on information available as of January 9, 2003.

In October 2000, El Paso reported accurate numbers but the evidence indicates that El Paso desk heads, traders, and management considered whether to continue reporting accurate numbers or go back to reporting the book bias. The evidence shows that many of the traders, desk heads, and managers recommended going back to reporting the book bias. The data in Table III-1 strongly suggest that for those regions, El Paso did indeed go back to reporting its book bias for the period from November 2000 to December 2001.

El Paso states that it has stopped reporting trading information to the Trade Press.

Staff Reaction to the Admissions of False Reporting

Staff expressed concerns about the accuracy of the published price indices in its Initial Report. At that time we had no conclusive evidence that anyone had actually manipulated the published price indices. We argued that, due to the generic problems with the price reporting process and problems specific to the California Border gas indices, many companies had the incentive and ability to manipulate the indices. The admissions (described above) by five significant energy trading companies (Dynegy, AEP, Williams, CMS, and El Paso) confirm our concerns. Particularly troubling is the common theme that because everyone knew that everyone else was manipulating the indices by reporting false prices and volumes, it was somehow acceptable and even necessary for this to take place. Whether the intent was to influence an index in order to favor its positions or to somehow offset the false information being provided by

others, the traders of these companies were deliberately manipulating the published price indices by providing false data to the Trade Press. In addition, in many cases the heads of the trading desks were aware of the manipulations; in some cases, they were orchestrating the manipulations.

Many traders said they were attempting to manipulate the index prices in order to offset the attempts at manipulation by others. The AEP traders were asked if they ever provided information that they knew in advance would be detrimental to their trading position, and each indicated they had not. The obvious followup question, which was not asked by AEP (or at least not reported by AEP), is whether they ever provided information that they knew in advance would be good for their trading position. In general, the traders from the companies that admitted to providing inaccurate data said they were doing so in order to ensure that their positions were reflected in the indices and that they were seen as a major player in the markets. In particular, the CFTC has concluded that Dynegy was knowingly submitting false information to the reporting firms in an attempt to skew the indices to favor its own position. Staff concludes that the most likely scenario is that traders were manipulating price indices not to help create accurate indices by offsetting the inaccuracies of others, but, to the extent possible, to move the indices in a direction that favored their positions and create the illusion that they were key players at particular locations.

The responses also indicate that price index manipulation was part of the price formation process. The indices are supposed to be based on fixed-price trades. Traders manipulated the indices by reporting false and inaccurate data on their fixed-price trading activity. Any resulting inaccuracy in the published price index fed back into the markets. Staff interviews with traders indicate that traders looked at prices in *Gas Daily* every day, just as they watched the activity on EOL. The previous day's index price served as an indicator of the opening trading price. In addition, manipulation of the daily indices would feed back into the monthly indices because monthly and daily gas are, to some extent, substitutes for each other. Moreover, trends in daily prices (especially late in the month) provide price information for next month's gas.

One of the arguments made in defense of the price index reporting process and the accuracy of the indices is that, because there are entities with the ability and incentive to manipulate the indices in both directions, the manipulation is offsetting and therefore the indices are accurate. Staff does not find this argument to be persuasive.

First, there is no reason to conclude that all of the manipulation is exactly offset. For example, many of the entities with the most influence on the indices are on the same side of the market (that is, they want to see the price move in the same direction). Specifically, some of the large purchasers of natural gas at the southern California border bought gas at fixed prices but

sold it at an index price. The entities that bought gas at an index price would not be able to influence the price, but those that bought at a fixed price would have the incentive and ability to increase the index price.

In fact, six large natural gas buyers (Coral, Duke, Dynegy, Mirant, Reliant, and Williams) provided data from 18,320 natural gas transactions in California during the period from October 2, 2000 to June 22, 2001.[8] During that time the generators' fixed-price purchases were, on average, $0.30/MMBtu less than the published price indices for southern California.[9] During the period they paid $46.8 million less for their fixed-price purchase than they would have paid if they had purchased the gas at the index price.

Table III-2 shows that in December 2000, a month with extremely high and volatile natural gas prices in California, fixed-price purchases were, on average, $0.78/MMBtu lower than the published index, which is supposed to be based on fixed-price trades.

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[8] Reishus and Wang Data filed under EL00-95.

[9] In addition, their index-priced transactions were, on average, $0.10/MMBtu lower than the published index prices.

Table III-2. December Southern California Average of (Spot Price — Published Index)

	Fixed Price Transactions	Indexed Price Transactions
Buys	-0.78	-0.11
Sells	0.30	-0.22

Second, it is unrealistic that the traders could use their feel for the market (as described by the AEP traders) to predict the direction and magnitude of the other traders' manipulations and calculate a perfectly offsetting manipulation of their own. Staff finds that argument to be preposterous. As stated by the Trade Press on numerous occasions, the only way to ensure accurate index prices is to provide counterparties to all trades so they can be cross-checked, thus forcing the trading companies to provide accurate data (unless they are colluding) or have it thrown out by the Trade Press.

Third, Staff cannot recommend relying on such a haphazard method—hoping that the editors of the trade publications can perform some kind of alchemy and arrive at accurate prices despite deliberate manipulation and no systematic method of reporting the data to the Trade Press. Since the Commission has jurisdiction over most of the transactions that form the basis for the indices and many Commission-jurisdictional transactions (both gas and electric) are based on the indices, it needs to be sure that the published indices are accurate, not subject to manipulation, and not serving as a means for price manipulation. As the agency of the U.S. Government with the statutory obligation to ensure just and reasonable electricity rates, the

Commission cannot rely on a recipe of offsetting false reports, traders' feel for the market, and editorial judgment (subject to claims of First Amendment protection) for accurate price indices.

The conversations between the editor of *Inside FERC* and the El Paso traders show the inherent flaws in the system. In those conversations (which took place in late 2001, after the California energy crisis), the *Inside FERC* editor is clearly trying to obtain the most accurate data possible. This is consistent with Platts' assertion that it tried to publish the most accurate indices possible. However, the fact that the industry was not providing counterparties by late 2001 shows that the indices were still subject to manipulation. Without counterparty information, there was no way for the Trade Press to cross-check for accuracy of the reported trades. Platts and other companies that publish indices have made improvements in their data-gathering process in the last few months. In addition, energy trading companies have expressed a willingness to provide complete and accurate data, including counterparty information. It is clear to Staff that without counterparty information from all parties providing trade data, the published indices cannot be counted on to be accurate and free from price manipulation.

Even with counterparty information, price indices could be manipulated through collusion by (1) engaging in wash trading, which, as described in Chapter VII, occurred on numerous occasions during 2000 and 2001; or (2) arranging with another company to submit false information in

order to provide phony counterparties. Therefore, providing counterparty information is a necessary, but not sufficient, condition for price indices that are accurate and free from manipulation.

The Commission's vision is to ensure dependable, affordable energy through sustained competitive markets. The basis for using markets to set energy prices rather than cost-of-service regulation is the belief that competitive markets can more efficiently allocate scarce resources. In a properly functioning competitive market, the market price serves to allocate resources. The price represents the value of the resource to society, reflecting demand and supply conditions. The price sends a signal to potential suppliers considering expanding production or entering the market; to the financial industry considering whether to finance such expansion, and, if so, at what interest rate; to consumers making short-term decisions regarding how much energy to consume at a given time and long-term decisions such as whether to buy an energy-efficient furnace or a gas or electric appliance; and to energy-intensive businesses regarding where to locate and which energy source to use. The price also signals where infrastructure improvements are most critical. A manipulated price sends a false price signal and misallocates resources.

The accuracy and integrity of the market price are especially critical in capital-intensive industries such as natural gas and electricity. Moreover, as the predominant input choice for new electricity generation, the accuracy and integrity of natural

gas prices are particularly critical. The decision of whether and where to build a natural gas-fired generation facility is distorted if the natural gas price has been manipulated, which leads to long-term misallocation of critical resources and ultimately hurts consumers. Accurate natural gas prices that are free from manipulation are the cornerstone of competitive natural gas and electricity markets.

In addition, the published price indices serve as the basis for a huge volume of financial derivative trading. Energy companies that serve customers use financial markets to hedge the risk in the energy industry, which is significant due to inherent price volatility and the need to make long-term decisions with little certainty regarding future prices. When index prices are manipulated (up or down), financial derivative products are not priced properly, market participants lose faith in financial markets, and the cost of risk management is increased. Ultimately, energy consumers are hurt by the increased costs and inability of energy companies to properly manage risk.

Responses to the October 22, 2002 Data Request

On October 22, 2002, Staff sent a data request to the largest natural gas marketers and asked a series of questions regarding past reporting practices, any internal procedures or controls they may have had in place; any changes they have made to those procedures; and any investigations

they have in progress.[10] Staff required those companies to investigate whether, in fact, they had misreported data to the Trade Press and to provide information on actual trades and reported data so that Staff could check the accuracy of those reports.

This section describes the price reporting practices of seven of the largest natural gas marketing companies in the United States. The practices for reporting information to the Trade Press varied across companies, but there are common themes across companies. In most cases, the reporting was done by the trading desks and the traders themselves; there was little, if any, internal oversight by management or desk heads. In fact, in some cases, the desk heads and management were orchestrating the price manipulation. The traders claim they provided false data in order to (1) offset the perceived dominance of Enron's input to the process, (2) prove that they could affect the published price indices, (3) offset the inaccuracies that other companies were reporting, and (4) replicate the prices they perceived to be the true range and average of the market. Staff concludes that, at least in some cases, the false reporting was done to favor the traders', desks', or companies' financial position. In fact, the CFTC has concluded that Dynegy "knowingly submitted false information to reporting firms in order to skew those indices to Dynegy Marketing."

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[10] Of these ten, three (Dynegy, Williams, and AEP) had already received data requests and/or subpoenas from Staff under Docket No. PA02-2 regarding their price reporting practices.

In some cases, the traders understood the process the Trade Press used to try to filter out false data and drew on that understanding to manipulate the prices by constructing phony counterparties and keeping the false data within the range of trading, but only reporting numbers that favored their position (i.e., traders that wanted to see a low price only reported low trades or inflated volumes on those trades). In some cases the traders claim they were unsure of what the Trade Press was looking for, so they would report a mix of real trades, observed trades, and fabricated trades that reflected their sense of market conditions.

Duke Energy Trading and Marketing

Duke Energy Trading and Marketing (Duke) performed an analysis of the correlation between the data reported by its Salt Lake City office (West trading desk) to the Trade Press and the actual trade data recorded in Duke's database for its western United States transactions. The analysis found that for monthly transactions, 95 percent of the reported trades matched the recorded trade on price, 93 percent matched on volume, and 92 percent matched on both price and volume. For daily transactions reported to the Trade Press, 88 percent of the reported trades matched the recorded trade on price, 82 percent matched on volume, and 78 percent matched on both price and volume. Stated another way, 8 percent of the reported monthly trades were inaccurate in terms of price, volume, or both, and 22 percent of reported daily trades were inaccurate in terms of price, volume, or both.

Duke interviewed its Salt Lake City traders to try to understand why there would be occasions when the recorded trade and the reported trade did not match completely. The reasons offered by the traders included (1) some small-volume trades were excluded from the reporting, (2) some trades occurred after the office's reporting deadline of 1:00 p.m. (Mountain Time), (3) the inadvertent failure to attach a list of online trades to the form that was faxed to the Trade Press of daily gas indices, (4) a trader's use of "an eyeball estimate" of a weighted average price for transactions that were reported on an aggregated basis, and (5) a trader's reporting of an intracompany trade that was normally excluded. Duke concludes that for the vast majority of its trades, the Salt Lake City office reported its actual transactions to the Trade Press and there was no trader intent to manipulate the indices.

Duke did not perform a similar analysis for its eastern United States transactions because "DETM's Houston office reported to the Trade Press data for indicative transactions on broader market information than just its transactions."[11] That is, because Duke reported trades that it observed in the marketplace, it would not be expected that the reported data would correlate highly with recorded transaction data.

In addition, Duke provided Staff with electronic records of the spreadsheets it used to record the

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[11] Duke response to October 22 Staff Data Request, November 8, 2002.

range of trades and volume-weighted average that it sent to *Gas Daily*. Examination of these spreadsheets shows that Duke calculated its volume-weighted average by taking the simple arithmetic average of its high and low trades for the day. Therefore, even if the Duke traders were trying to report accurately, they were not. Calculating a volume in this manner would not create a systematic bias in either direction (that is, tending to systematically overstate or understate the volume-weighted average); it provides another source of inaccurate price data that is reflected in the published price indices.[12]

Duke did find significant inaccuracies in its reporting by the Mid-Continent, Gulf, and East trading desks, all located in Houston. Unlike traders in Salt Lake City, who reported on actual trades, the Houston traders reported their "sense of the market." The reporting was done by the physical gas traders, who generally received the data from management and the financial traders. The investigation has found that the management and financial traders sometimes biased the reported numbers to favor the trading desk's financial position.

Duke contends that by providing a "sense of the market," the traders thought they were providing what the Trade Press was looking for. Staff finds

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[12] If the distribution of prices was perfectly symmetric about the mean price, then the volume-weighted average would be equal to the simple average of the high and low trade. There is no reason to believe that would be the case with any regularity.

this argument unpersuasive because, for monthly prices, *Inside FERC* was explicit in its description of what it needed for its monthly index—actual fixed-price physical natural gas trades, not a "sense of the market" or basis or financial trades.

Duke states that most of the senior management in the Houston office, including all who participated in the inaccurate reporting, are no longer with the company.

Duke states that its internal review indicates that the process of reporting natural gas market data to the Trade Press was informal. Duke claims that much of the informality was due to a general lack of understanding by Duke regarding what the various publications were seeking. Duke states that it has implemented new compliance procedures, under the direction of its chief risk officer, to ensure the accuracy of the data reported to the Trade Press.

Coral Energy

Coral Energy (Coral) interviewed all employees who provided data to the Trade Press. Coral has concluded that "the information it provided to the Trade Press accurately reflected then current market information." Coral described the type of information each trader (or other employee that provided trade data) gave the Trade Press. For both daily and monthly data, many Coral traders provided prices and volumes of (1) actual trades they had entered into, (2) trades they heard had

taken place in the market, and (3) trades they had seen on trading platforms, including EOL.[13]

Coral does not address the seemingly obvious problem with reporting prices and volumes of trades that traders had "heard about" or "seen on electronic trading platforms." If a trade on EOL was witnessed by 100 traders, that does not mean the trade happened 100 times. However, if the industry practice was to report prices and volumes of trades that had been observed or heard about, then trading volumes were overstated and those trades made on EOL (the most widely observed trading platform) carried undue influence on the published price indices. Staff described the influence of EOL in the gas market price formation process, especially the Southern California Border daily market, in the Initial Report. The fact that traders were reporting trades they saw on EOL, sometimes misrepresenting them as their own trades, is another way EOL influenced the published indices. As stated throughout this chapter, many large traders used the same sort of "survey" reporting described by Coral.

Mirant

Mirant was the largest natural gas marketer in 2001, as measured by total value of trades. Mirant states that prior to September 2002, it had no formal or consistent process in place for communicating wholesale natural gas transaction

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[13] Some Coral traders only provided data on trades they had actually made.

data to the Trade Press. Mirant did not have any internal policies, spreadsheets, or directives with respect to the form or type of information that was being communicated to the Trade Press. Natural gas traders provided natural gas transaction information, generally over the telephone and through e-mail and facsimile, based on questions asked by various Trade Press representatives.

Mirant's Office of General Counsel and Office of Internal Audit investigated Mirant's practice of reporting information to the Trade Press for the period January 1, 2000 to October 15, 2002. Mirant's investigation team concluded that Mirant traders did not provide data that were nonrepresentative of either transactions undertaken by Mirant or actual market conditions.

Mirant did find that traders often reported transactions they had seen in the marketplace rather than only reporting its own fixed-price trades, but they believed they were reporting in good faith what was transpiring in the marketplace. Mirant's investigation indicates that the Trade Publications relied on traders that were active in the market and had access to information about the transactions of other players to provide prices from observed transactions. Mirant explains that the "observed transactions" came from computer screens provided by certain brokers and online trading platforms such as EOL and Alltrade.

Mirant found that one trader deliberately took note of "observed transactions" and reported observed prices to *Gas Daily*. That trader, who bought natural gas to serve Mirant's electric generation

plants in California, had strong suspicions that the price index was being skewed upward by other trading companies that were net sellers of natural gas in California. He stated that he reported actual "observed transactions" at prices lower than he was transacting to counter the artificially high prices he perceived were being reported to push up the index price. The trader stated that he told *Gas Daily* and NGI that their published indices appeared to be nonrepresentative of the California gas market and that there were several occasions when the Trade Press did find reported trades that were not representative of the market and excluded those trades from the index calculation.

Since October 2002, Mirant has implemented a formal process for reporting information on natural gas transactions to the Trade Press. Mirant now directs all calls or contacts from the Trade Press to a designated employee in the Risk Control department who is responsible for collecting responsive data from Mirant's actual trading records for submission to the publications. Moreover, since October 2002, records are being kept as to data requested and data submitted.

BP Energy Company

BP Energy Company (BP) provided records for trading data reported to the Trade Press by fax or e-mail. BP states that during the period in question, it provided natural gas prices and transaction data to the Trade Press on spreadsheets containing information drawn or downloaded directly from the transaction support system. BP had a formal system in place for

reporting transaction data to the Trade Press that included assigning the responsibility for reporting to a single trader with oversight and accountability from the trading managers.

BP could not provide records of the data reported to the daily publications over the phone. BP states that any information reported over the phone came directly from daily deal sheets. BP's internal price index reporting policy requires all discussions with third-party publications to be limited to the designated representative, with the trading managers serving as backups.

Reliant

For daily price reporting (*Gas Daily* and NGI), Reliant reported daily trading by fax to the Trade Press. Each day, traders would pass a daily worksheet around the trading floor and one or more traders would handwrite information on trading points with which they were knowledgeable. Some traders reported pricing for Reliant trades; others also reported other trades observed in the markets. At 2:30 p.m. each day, a Reliant analyst would fax the worksheet to the Trade Press. Reliant states, "[t]he worksheet was not reviewed by a supervisor or another employee before it was transmitted."[14]

Reliant used different monthly price reporting procedures at its various trading desks. It has almost no record of the West desk's reporting (it

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[14] Reliant response to October 22 Staff Data Request at 4.

found a single spreadsheet from the Denver office). However, Reliant was able to locate many of the spreadsheets sent from the East trading desks (Southeast and Northeast).

Reliant's process for reporting to *Inside FERC* is particularly noteworthy. As described in this Report, Platts' *Inside FERC* had a standard spreadsheet that it required companies submitting trade data to use for reporting bid-week trades for its monthly index. The spreadsheet required price, volume, date, and company name to be entered for each reported trade. Reliant did not use actual trades to fill in the bid-week survey; rather, it used a three-part process to generate a set of fictitious trades to enter into the spreadsheet: First, the traders agreed to a "consensus" range of trades. Next, an analyst determined the midpoint of the consensus range. Finally, "the analyst would generate a list of prices—all falling within the consensus range—and volumes that arithmetically led to a weighted average at the consensus midpoint."[15]

Reliant states that it believes the method described above was not meant to influence prices; rather, it was intended to provide accurate information about market prices. In support of this conclusion, Reliant notes that the volumes reported to *Inside FERC* were often substantially lower than Reliant's actual trade volumes at the reported locations. Reliant argues that someone trying to

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[15] Reliant response to October 22 Staff Data Request at 8.

influence the index price would tend to overstate volume rather than understate it.

Reliant compared the reported data to the actual trade data captured in its internal computer system. It found that approximately 65 percent of the reported midpoints were within 1 percent of the actual midpoint, approximately 97 percent were within 5 percent of the actual midpoint, and approximately 99 percent were within 10 percent of the midpoint. Moreover, the data support Reliant's claim that it consistently underreported the volume of its trades. Of 514 price reports for which comparisons could be made, the reported volume was less than the actual trade volume in 432 cases (84 percent). In the cases where Reliant underreported its volume, the volume reported was approximately 15 percent of the actual volume. In 84 cases (approximately 16 percent), the reported volume was greater than the actual volume—on average, approximately 100 percent above the actual volume. Reliant states that the discrepancy in volume was not surprising because traders focused on accurate prices rather than volumes.

Staff notes that accurate volumes are a critical part of calculating an accurate price index because the indices are volume-weighted averages. It is clear from the investigation that one of the ways in which companies tried to manipulate the published price indices was by reporting inaccurate volumes—both by overstating volumes of trades that favored their position and by understating volumes of trades that hurt their position.

Sempra

Sempra Energy has three affiliates—Sempra Energy Trading (SET), Southern California Gas Company (SoCalGas), and San Diego Gas & Electric (SDG&E)—that reported prices to the Trade Press. Each entity had different degrees of interaction with the Trade Press and had its own reporting procedures.

SET states that it sent e-mails to *Inside FERC* and NGI and received phone calls from *Gas Daily* and Btu.[16] SET states that no record exists of any of the telephone conversations with *Gas Daily* and Btu. SET found only five e-mails of data submitted to *Inside FERC* and NGI for all of 2000 and 2001. SET compared actual trade data with data reported to the Trade Press for the small subset of reported trades for which it had records, and found no discrepancies. SET states that it has learned of some minor discrepancies ($0.01 to $0.02/MMBtu) in the data reported to *Gas Daily* on a few occasions involving an area in the Rocky Mountain region.[17] SET explains that both *Inside FERC* and NGI requested written transaction information via fax or e-mail for their monthly indices. With respect to *Gas Daily,* there was no formal reporting practice. As was the case with other energy trading companies, SET employees were sometimes

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[16] Btu Publishing Inc. publishes energy market information and price indices in its publications: Btu Weekly, Btu's Daily Gas Wire, and Btu's Midday Report.

[17] SET response to October 22 Staff Data Request at 2.

asked by *Gas Daily* to report or comment on general market conditions and/or other trades they may have been aware of. SET states that "Responses to such requests varied. Some employees refused to comment on trades not executed by SET. Others reported their knowledge of various trades in the market based on data available on electronic trading platforms (such as ICE)."[18]

SoCalGas unequivocally states that no employee provided inaccurate data to the Trade Press. They provided written records of the trades but state that there is no way to check on them because they were reported over unrecorded phone lines. SoCalGas also states that it is required by the California Public Utilities Commission (CPUC) to submit all of its trade data to the CPUC and that it provides the same data to the Trade Press that it provides to the CPUC. In addition, SoCalGas provided Staff with spreadsheets identifying all spot market transactions for 2000 and 2001; the spreadsheets indicated if the transaction was a purchase or sale, price, volume, and counterparty. These data were the same as the data submitted to the CPUC.

SDG&E states that it was not a significant natural gas trader and, as such, its employees provided prices and volumes to the Trade Press on a limited number of occasions. SDG&E states that no employee provided any inaccurate information to any entity publishing price indices. SDG&E

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[18] SET response to October 22 Staff Data Request at 3.

further states that as a regulated California public utility, it provides monthly reports to the CPUC's Energy Division and to the CPUC's Office of Ratepayer Advocates, providing details of all its physical and financial natural gas transactions.

Aquila Merchant Services

Aquila Merchant Services (AMS) states that it had three trading desks: West, East, and Mid-Continent. It reported daily trading data to *Gas Daily* and monthly data to *Inside FERC* and NGI; daily trading data were reported by fax. Each day traders would pass a form (the Aquila Energy Marketing *Gas Daily* Pricing Log) around the trading floor and one or more traders would handwrite information on trading points with which they were knowledgeable. AMS would report the range of trades, midpoint, and volume. AMS states that although the desk head was ultimately responsible for the information sent to *Gas Daily*, it appears that any trader could enter data onto the form. Interviews with traders indicate that some traders provided only actual AMS trades while others reported a combination of trades they saw on electronic platforms (such as EOL) and actual AMS trades. Traders indicate that there was some uncertainty over the specific data *Gas Daily* wanted, that is, whether *Gas Daily* wanted only actual trades or more of a market survey.

For monthly reporting, AMS employees reported trade data by e-mail on a spreadsheet that was stored on a shared drive. As with daily reporting, although the desk head was ultimately responsible

for the information sent to *Inside FERC* and NGI, it appears that any trader could enter data onto the form. In compliance with Staff's data request, AMS analyzed the accuracy of the reported monthly prices by comparing the actual trade data with the reported trade data. AMS found that the data reported by the West desk were accurate, but the data reported by the East and Mid-Continent desks showed discrepancies for January, February, March, April, and June 2000. In one case, a trader stated that the desk head provided a range of prices that he knew were not based on real prices and a volume-weighted average price that he knew was not accurate, and gave instructions to fill in fictitious numbers within the false range on the spreadsheet to arrive at the false weighted average. The trader stated that this practice stopped after October 2000, when AMS instituted a practice of reporting counterparties for every trade and only reporting fixed-price trades.

The evidence suggests that the attempt at price manipulation was not done specifically to offset the misreporting of other companies, but there was a general sense among the traders and desk heads that other companies (including Enron) were attempting to manipulate the published indices to their financial advantage and hurting AMS. One trader described it as a Prisoners' Dilemma,[19] that

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[19] In the Prisoners' Dilemma, two prisoners must decide separately whether to confess to a crime; if only one prisoner confesses, he will receive a lighter sentence and his accomplice will receive a heavier one, but if neither confesses, sentences will be lighter than if both confess. The individual incentives

is, given what the other large trading companies were doing (reporting false data to favor their positions), his best response was to report false prices even though everyone would be better off with accurate price indices.

AMS states it had concerns with the price reporting methodology and it perceived that others were manipulating the indices. Through interviews with traders, desk heads, and former AMS managers, it found specific accounts of AMS employees contacting the Trade Press to question the accuracy of the published indices when AMS employees did not believe the indices were representative of market conditions. AMS provided copies of letters sent by its General Manager to Financial Times Energy and *Inside FERC* regarding the methodology used to compile its indices and advocated accepting only trade data from companies that have agreed to be audited.

In August 2002, AMS announced that it was shutting down its wholesale marketing and trading operations. By the end of the third quarter of 2002, AMS had eliminated most of its wholesale marketing and trading business, including market making activity and speculative trading. By the end of the fourth quarter of 2002, AMS had unwound almost all of its energy trading positions. AMS states that it has eliminated most of its

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faced by both prisoners force them to confess, even though they would both be better off if they did not. The outcome (mutual defection) is an example of a Nash Equilibrium in game theory. See, for example, Robert S. Pindyck and Daniel Rubinfeld, *Microeconomics*, 5th edition, pp. 442-444.

positions in merchant operations and most of its employees, and no longer reports trade information to energy industry publications such as *Gas Daily*, *Inside FERC*, or NGI.

Staff Reaction to Responses to the October 22, 2002 Data Request

The answers to the questions in the October 22, 2002 Data Request show that the industry lacked systematic reporting procedures and internal verification processes.[20] The responses also show that the price manipulation goes beyond the five companies that have admitted to such behavior.

As noted above, most of the largest natural gas marketing companies in the country had no formal process for reporting trade data to the publishers of the price indices; the process was left to the trading desks and the traders themselves. Traders from all companies describe a typical trading day as hectic, pressure packed, and frenetic. One of their many tasks was to report trading data to the Trade Press; this was viewed as bothersome but necessary. Often it was a job given to the newest employee. Many companies report passing around a form or using a spreadsheet on a shared drive. The last person who filled out the form or spreadsheet may have been required to total the

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[20] BP Energy is a notable exception. It is clear from BP's response to the Staff data request that it recognized the influence a significant trader such as itself could have on the published indices. BP put internal controls in place to ensure the accuracy of the reported data and a employed a system of accountability for the trading desk heads.

numbers and send them to the Trade Press. There was nothing to stop a trader from changing the numbers someone else had entered. In other cases, traders took an oral "survey" to get a sense of where the market was trading. Sometimes they represented it to the Trade Press as an actual survey, but in other cases they made up trades to average out to a number that was consistent with this "survey."

Although *Inside FERC* did have a spreadsheet and requested data on fixed-price deals transacted during bid week only, it is clear that the companies were reporting a combination of fixed-price deals during bid week, trades observed on EOL, and trades they made up to reach a predetermined average.

The process for reporting daily prices was more chaotic than the process for the monthly indices. Again, the responses show that traders reported some combination of actual trades, trades they observed, and trades they made up. Some traders reported a range of prices and some reported an average. Sometimes the average was volume weighted; at other times it was the simple average of the high and low trades. Some traders received phone calls, some called the Trade Press, and some faxed prices and volumes. Staff inspection of the faxes shows that there was no standardization of the data reported to the Trade Press. In some cases volumes and average prices were reported, some had individual trades, some showed basis differentials, and some were financial rather than physical deals. Because most of the reporting was

done by phone, there are significant barriers to finding out what the traders actually reported to the Trade Press. As with *Inside FERC,* the editors of *Gas Daily* assert First Amendment protection, so there is no way to ascertain what they were told and their awareness of the extent of the manipulation. Moreover, the companies themselves were unable to re-create their daily reporting because (1) it was done by phone and the phone calls were not always recorded (even if they were recorded, it would take thousands of hours to listen to the recorded calls) and (2) the Trade Press denied companies' requests for their own data, citing confidentiality and First Amendment protection.

In short, the responses indicate that the reported price indices were based on data that were confusing, inaccurate, misleading, and often false. Staff concludes that an accurate index could not have resulted from the data that were reported. In addition, because the Trade Press has not revealed their data, there is no way to verify the accuracy of the reported indices by comparing them with the data reported to the Trade Press.

Staff Attempts To Verify the Accuracy of the Reported Indices

As part of the investigation, Staff attempted to verify the accuracy of the reported price indices; however, there have been significant barriers to this process. First, in many cases the companies cannot reproduce the data they reported to the Trade Press for the reasons described above: daily reporting was done by phone, often on unrecorded

lines; many traders reported their own trades along with those they observed in the market; and records of the reported data were not maintained because there was no formal process for reporting the data. In addition, the Trade Press has not revealed the data used to calculate the indices.

One of the issues that became apparent to Staff while investigating Enron and other energy traders is that they lack many business records that are essential when investigating allegations regarding trading activities. Because the companies have argued that their trading activities are not jurisdictional to FERC, CFTC, or SEC, many fail to keep records that would be required of a regulated company. For example, maintenance of phone tape recordings can be haphazard at these companies. Staff found evidence indicating that Enron had received a legal opinion finding that their 4-month tape retention policy was not in compliance with FERC regulations. During the same time that Enron received this finding, they were reducing their retention to 30 days. Although the retention of phone tapes in the power industry is an accepted practice, the length of retention varies. Specifically, the lack of record keeping, especially recorded telephone conversations, made it difficult and, in some cases, impossible to verify the data provided by the companies to the Trade Press.

As described earlier in this chapter, Staff analyzed the trading data of six major gas purchasers in California and compared them to the published price indices. The analysis uses data submitted under Docket No. EL00-95 by David Reishus and

Patrick Wang of Lexecon Inc. on behalf of five companies involved in that proceeding (Duke, Dynegy, Mirant, Reliant, and Williams). The database they used included spot transactions from six companies: Coral, Duke, Dynegy, Mirant, Reliant, and Williams. Staff found that for those six companies during that period, their fixed-price purchases were systematically lower than the published index prices (which are supposed to be based on that type of transaction only).[21]

Industrywide Reporting Issues

As described in the Initial Report, the industry relies on both daily and monthly natural gas price indices. The monthly price indices are based on fixed-price transactions occurring during bid week. During the course of the investigation, it became clear to Staff that transactions occurring during bid week do not give an accurate picture of the monthly natural gas trading activity. A number of large traders (e.g., Dynegy, AEP, and Williams) stated that they did very little fixed-price trading during bid week. They stated that they mainly traded indexed contracts or small fixed-price deals designed to fine tune their physical and/or financial positions for the month. Data provided from the large natural gas traders and marketers confirm this position. In fact, traders said that one of the reasons they fabricated the prices and volumes they provided to the Trade Press was that they had very few trades during bid week and they wanted to reflect their actual trading activity for the

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[21] See Table III-2 on page III-17.

month. Another problem with reporting bid-week trades only is that the market is quite thin during this period; that is, there are fewer buyers and sellers (at least for fixed-price deals). Therefore, even if prices for trades made during bid week were reported accurately, those prices do not necessarily reflect competitive market prices.

The Testimony of Michele Markey

On November 18, 2002, Michele Markey testified before the State of California Senate Select Committee to Investigate Price Manipulation of the Wholesale Energy Market. According to her testimony, from May 1998 to September 2001 Ms. Markey was in charge of the gas price and electric price teams that gathered information from the industry for publishing the price indices in *Gas Daily* and *Megawatt Daily*. From her experience as a trader and her work at Financial Times Energy and Platts,[22] Ms. Markey described the energy trading process, the data gathering process at the daily and monthly publications, and the perception in the marketplace of the published price indices; she also gave examples of how an index could be manipulated. When asked by Senator Dunn if, in her opinion, it was common practice in the industry to exaggerate the prices reported to the indices, she replied: "It was

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[22] Ms. Markey also worked as a West desk trader for Reliant prior to her employment with Financial Times and Platts. At the time it was called Noram Energy Services.

common industry knowledge that exaggeration was part of the process."[23]

One of the subjects Ms. Markey addressed was that traders understood that if the prices they reported were too far out of line with real prices, they would be thrown out by the editors of the price indices. Therefore, traders would report trades that favored their positions but were within the range of actual trading. She explained that because the indices were weighted averages, traders could manipulate the index by reporting inflated volumes at prices that favored their positions:

> Common practice was to exaggerate your transactions to the price reporters, report more volume, report a higher price than that was actually transacted. You stretched your price in favor of what the company's position was, or don't report at all, because you would know whether or not your indices—your volume and price could in fact affect the index.[24]

Ms. Markey also discussed a proposal by Enron for *Gas Daily* to create an electronic platform price index. The index was designed to capture all trading on electronic platforms, but ultimately captured only Enron. She testified that:

> In effect, Enron gave us the methodology and dictated to us how that price index was going

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[23] Markey testimony at 13.

[24] Markey testimony at 15.

> to be calculated. And we set it up basically at their request.[25]

In the summer of 2001, Ms. Markey proposed that *Gas Daily* (owned by Financial Times Energy at that time) audit the data from EOL in order to ensure its accuracy. She stated that a number of energy traders complained that Enron was manipulating prices through EOL. She arranged for Price-Waterhouse-Cooper to audit the data and the contract was ready to be signed; however, in August 2001, the plan was abandoned when Platts purchased *Gas Daily*. Therefore, there was no audit of the Enron data.

On November 19, 2002, the president of Platts, Harry Sachinis, issued a statement in response to Ms. Markey's claims. Mr. Sachinis explained why Platts had rejected her proposal to publish an EOL price index and to audit the data from EOL:

> Michele Markey, who worked for Platts for only six months, implied that we quashed a suggestion to audit questionable trading data supplied by Enron because Enron was a Platts customer. This is completely false. In fact, Platts chose not to pursue Ms. Markey's auditing proposal because publishing an index based on Enron Online trading data would have little if any value to subscribers. Platts had previously declined requests by Enron to publish such an index. Platts believes that an index based on a single company's trades

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[25] Markey testimony at 39.

would be unreliable and subject to manipulation, whether audited or not.[26]

The Effect of Enron and EOL on the Published Price Indices

The issues discussed by Ms. Markey are related to some of the concerns raised by Staff in the Initial Report regarding the influence of EOL on the published price indices. As stated in the Initial Report, EOL was a significant source of price discovery in the natural gas markets. The responses to the data request confirm that many traders looked at EOL to observe market conditions. In fact, many traders actually reported trades they observed on EOL to the Trade Press; some of those traders misrepresented those trades as transactions they had made themselves. As described in this Report, EOL was a one-to-many trading platform, i.e., the Enron market maker was on one side of every trade done on EOL. The market maker established the bid and ask prices and profited from the spread between the two. In addition, the market maker had information superior to the rest of the market and had the ability to influence the price. By posting the bid and ask prices for a particular location at a given price, an Enron trader would have a greater likelihood of affecting the index price at any point traded on EOL than any other single trader. Thus, trades made on EOL could be fed into a particular index over and over, as other traders were reporting what they observed on EOL to the Trade

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[26] Platts response to Markey, November 19, 2002.

Press. Some of the traders that attempted to manipulate the indices said that they were doing so in order to offset Enron's perceived dominance at particular trading points, particularly at Topock on the California border.

Ms. Markey proposed publishing an EOL price index and auditing Enron's reporting practices. As argued by Platts' president Harry Sachinis:

> Platts chose not to pursue Ms. Markey's auditing proposal because publishing an index based on EnronOnline trading data would have little if any value to subscribers. Platts had previously declined requests by Enron to publish such an index. Platts believes that an index based on a single company's trades would be unreliable and subject to manipulation, whether audited or not.

Staff agrees with Mr. Sachinis's conclusion that an index based on a single company's trades would be unreliable and subject to manipulation. The facts uncovered in this investigation indicate that EOL had an undue influence on the published indices, especially the SoCal Topock *Gas Daily* Index. Those facts are as follows:

1. A large percentage of the legitimate trading for SoCal Topock took place on EOL.

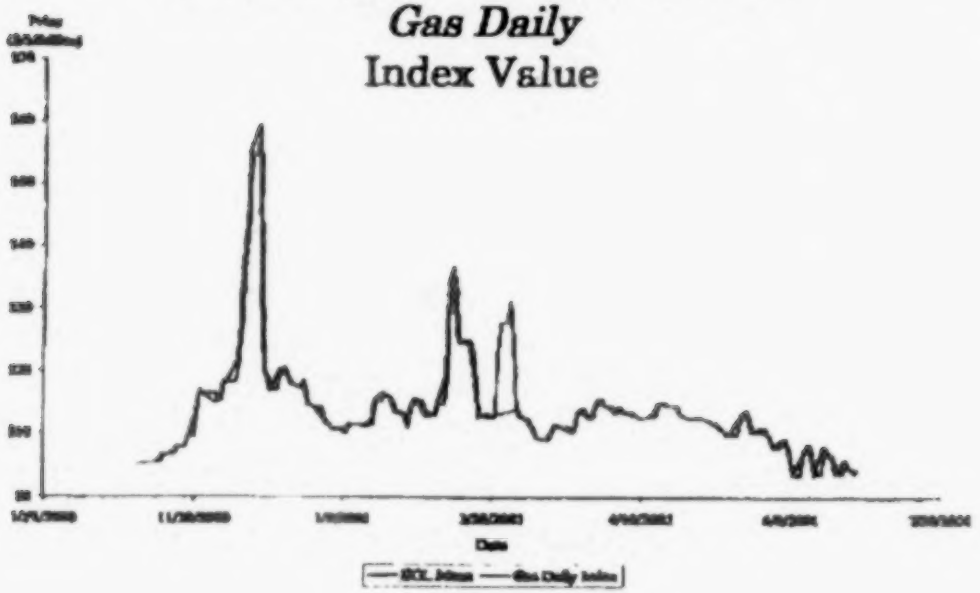
2. Much of the trading for SoCal Topock on EOL was between Enron and one counterparty, Reliant, which had a "netting arrangement" with Enron; this arrangement created the incentive to "churn" (see Chapter II) natural gas

on EOL. Only Enron and the Reliant trader knew of the netting arrangement.

3. Many traders reported trades they observed on EOL. Some traders misrepresented those trades as their own transactions.

4. Traders used EOL for price discovery, so the price of off-EOL trades was influenced by EOL.

Figure III-1
SoCal Topock: EnronOnline and *Gas Daily*
Index Value



As shown in Figure III-1, the *Gas Daily* price almost perfectly tracks the EOL price. In the Initial Report, Staff focused on one trading day, January 31, 2001. On that day, total trading volume at southern California Topock reported to *Gas Daily* was 6,766,000 MMBtu, which was the busiest trading point for that day. The total volume on EOL for next-day Topock gas for the day was 2,240,000 MMBtu. At the time of the Initial Report, Staff did not know the extent to which the

reporting of trading volume was manipulated by the traders. The total volume of trading on EOL for the day (2,240,000 MMBtu) is actual trading verified by Staff. The total volume reported by *Gas Daily* (6,766,000 MMBtu) cannot be verified because *Gas Daily* has not revealed its data. Moreover, as described above, most companies spoke to *Gas Daily*'s editors over the phone and did not keep records of what they reported. Staff suspects that of the 6,766,000 MMBtu reported by *Gas Daily*, much of it was based on trades observed on EOL in addition to the actual trades made on EOL. Finally, as noted in the Initial Report and discussed in Chapter II, more that 75 percent of the trading on EOL that day was with one trader from Reliant. Thus, the volume reported and the observed activity on EOL give the illusion of a much more liquid market than was actually present.

As described in detail in Chapter II, the anomalous trading behavior on EOL would influence the index price because the index price was a volume-weighted average.[27] That is, even if the price returned to where it was before a flurry of buying and selling (churning), the volume-weighted average would increase because all of the buys and sells occurring during the churning were taking place at a higher price. The fact that numerous market participants were reporting what they saw on EOL only intensifies this effect.

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[27] See Chapter II, Reliant's Churning Raised the Index Prices, page II-30.

In addition, as described in detail in Chapter IX, Staff has identified a case in which Enron traders used EOL to manipulate the Henry Hub market price. In the July 19, 2001 manipulation, the Enron market maker aggressively bought natural gas at Henry Hub to drive up the price, then aggressively sold the gas, driving the price back down, while his partners in the scheme made huge profits in financial derivative products by selling short when the price was rising, knowing that it would soon fall. Even though the price returned to its premanipulation level once the scheme was complete, the manipulation affected the index price because it is a volume-weighted average. The manipulation induced a price run-up and an ensuing fall. The trades that took place during the manipulation were all above the pre- and postmanipulation price level, thus bringing up the average. Again, the fact that numerous market participants were reporting what they saw on EOL intensified this effect.

The index prices also fed back into southern California natural gas market performance through the gas imbalance penalties on the SoCalGas system. As described in Chapter II, the penalties for imbalances on the SoCalGas system were 150 percent of the highest daily border price index at the Southern California Border for the month the imbalance is created. The highest daily border price index is an average of the prices from NGI's "Daily Gas Price Index—Southern California Average" and the *Gas Daily* "Daily Price Survey—SoCal Large Packages Midpoint Price." Therefore, a higher index price would increase the imbalance

penalty, which would in turn increase the price buyers were willing to pay for gas in order to avoid the penalty.

Staff concludes that all of the concerns expressed in the Initial Report have been confirmed. These concerns include the following:

- The Commission cannot independently verify the published price data.
- Undetected errors may exist because trade publications reporting spot and forward prices do not employ statistically valid sampling procedures or a systematic, formal verification procedure.
- Market participants have significant incentives to manipulate spot market prices reported to the reporting firms because natural gas is the fuel input for the electricity generators that set the market price in California.
- Wash trades may have an adverse effect on reported price data.
- EOL was a significant source of price discovery and formation and was potentially susceptible to manipulation by market participants, which could affect the published price indices.

Moreover, systematic attempts to manipulate the published price indices by various significant market participants occurred for at least 4 years. Because of these events, some companies have stopped reporting trading data to the Trade

Press;[28] many companies have left the trading business;[29] Dynegy settled with the CFTC for attempted price manipulation and other violations of the Commodity Futures Trading Act; some traders have been indicted on Federal criminal charges;[30] and AEP has been the subject of a class-action lawsuit.

On the positive side, there has been a movement within the industry to fundamentally reform the price reporting process. Suggestions for reform and tangible reforms have come from market participants, risk officers, the trade publications themselves, new entrants into the price reporting business, government agencies, consumer groups, and others.

On January 15, 2003, Commission Staff from the Office of Market Oversight and Investigation (OMOI) reported concerns regarding price index formation to the Commission at its public meeting. Staff explained the Commission's interest in price index formation, reviewed the public evidence that raised questions about it, defined the high-level criteria that are important to developing trustworthy price information in the future, and proposed some next steps.

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[28] For example, BP Energy, El Paso, Reliant, Williams, Constellation, and PP&L.

[29] For example, Aquila Marketing Services and CMS.

[30] See El Paso and Dynegy.

OMOI Staff proposed that in the future, the Commission should require that natural gas price indices meet certain minimum requirements before natural gas pipelines are permitted to use the indices in new tariffs or for other new regulatory purposes. Staff proposed that evidence for these new filings would need to be presented and reviewed to ensure that any referenced price index meets minimum index formation standards. In particular, the index would need to accurately reflect the market. For approval, a new tariff containing a reference to an index would need to demonstrate:

1. Confidence in the accuracy of price reporting—that is, the ability to verify that reporting is for deals actually done, not simply aggregate options.

2. Adequacy of coverage—that is, the ability to ensure the collection of adequate information to represent prices across the relevant marketplace.

3. Information about market liquidity or some insight into how much trading is going on a particular point in order to generate warnings when markets are thin and confidence when they are liquid.

4. Verifiability—that is, the ability to ensure integrity of the process through independent

review by a trustworthy third party (preferably not a government entity).[31]

Reform of the Price Reporting Process

Company Changes

Most of the companies involved in natural gas trading and marketing have implemented or are in the process of implementing new procedures for reporting trading information to the Trade Press. Specifically, many companies are moving the data reporting process away from the trading desks to the risk management office. In addition, companies are using their IT systems to capture the relevant data and send it directly to the risk management office. For example, Duke's new policy is as follows:

> Transactions are captured in DETM's trading systems. System queries have been developed to extract the relevant third-party physical transactions from the source systems and generate a report. The report contains the location, price, and volume for each transaction. The mid-office receives the electronic report and reviews the data. The transactions that are submitted to the publications are validated through a combination of confirmation and trade validation control procedures. These procedures will ensure that only information about actual transactions entered into with

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[31] FERC OMOI Staff Report. 2003 Natural Gas Market Assessment.

third parties will be provided to the Trade Press publications.[32]

As noted above, many other trading companies (including Mirant, AEP, and Dynegy) are adopting similar procedures. Staff finds that the revised process for reporting the relevant trade data to the Trade Press is a significant improvement that gives credibility to the data and that it is in stark contrast to the nearly universally haphazard reporting that took place in the past.

In addition, many companies (including PP&L, BP Energy, El Paso, Reliant, Williams, CMS, and Constellation) have stopped reporting trading data to the Trade Press. This is an understandable reaction given the chaos in the industry and the legal issues facing firms that have already admitted to providing false information and those that are still investigating or are the subject of investigations as to whether they provided false information. Because the indices for commercial transactions are very important, procedures must be put in place to ensure the accuracy of the indices and to encourage (or require) all market participants to provide complete and accurate data. Staff recommends that a process for establishing standards for price reporting be established by the Commission, with input and cooperation from the energy industry and the price reporting firms. In

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[32] Letter to Donald Gelinas, Associate Director, Office of Markets, Tariffs, and Rates, from Mark Perlis, Counsel to Duke Energy Trading and Marketing L.L.C., under Docket No. PA02-2, November 8, 2002.

addition, other government agencies (such as the CFTC and the Energy Information Administration) should be involved in the process. Significant progress has been made in this area since the issue regarding the accuracy of the reported indices became a subject of this investigation.

Proposal of the Committee of Chief Risk Officers

As described above, in many cases the reporting function is being moved to the companies' risk management offices. On November 19, 2002, the Committee of Chief Risk Officers (CCRO) (representing 31 energy companies) announced that it is examining how companies submit price data and what type of data are submitted and that it hopes to develop a "transparent and robust methodology" that will maintain confidentiality.

On December 4, 2002, the CCRO met with the publishers of energy price indices to discuss the attributes of credible market price indices for energy transactions. The forum was open to all companies currently publishing indices for the North American energy market. The CCRO stated that "[l]eaders of the Committee's Market Price Indices Working Group embarked on this task amid questions about how price indices for natural gas and electricity transactions have been, and are being, tabulated." The CCRO further stated that it "intends to consider information and points of view provided by the publishers' representatives to help produce draft recommendations that will lead to

credible, sustainable price indices in the coming weeks."[33]

On February 27, 2003, the CCRO released its Best Practices for Energy Price Indices white paper. The CCRO white paper includes recommendations for data gathering and submission procedures, index construction processes and methodology, and necessary contractual arrangements to facilitate the recommended changes on the part of both the companies supplying market information and any entity publishing energy price indices. The white paper also recommends a formal auditing process for both the energy companies providing data and the companies publishing price indices.

Data Gathering and Submission

The CCRO recommends that data providers supply index developers with these and other data points about each trade, every day they trade:

- Buy or sell indicator.
- Volume of energy involved.
- Flow date(s) of the energy transaction.
- Location of delivery points.
- Price.
- Any exchange or clearinghouse involved.
- Date the transaction was executed.

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[33] December 2, 2002 press release: Committee of Chief Risk Officers Plans Forum to Discuss Energy Price Indices.

- Counterparty.

Index Construction Process and Methodology

The CCRO has the following recommendations for index publications:

- Index developers should implement robust IT and data security protections against data misuse by employees.
- Index developers should publish the index methodology, including defining (1) a sufficient sample size for normal creation of an index and (2) the process for determining an index value where there are insufficient data.
- Index developers should ensure that the "strictest standards of care" will be maintained over commercially sensitive data. The paper also recommends that index developers audit their processes annually.

Contractual Arrangements

The CCRO recommends that before the information described above is provided, contracts should be drawn up and amended between counterparties to protect the confidentiality of the data. The CCRO encouraged data providers and index developers to sign an agreement that, among other things:

- Commits each party to a specific data-reporting protocol.
- Protects the confidentiality of the data.

- Prohibits the use of data beyond constructing an index.

The CCRO recommended that counterparty information should be submitted only after:

- Each individual with access to the data at the index developer signs a clear-cut, enforceable confidentiality agreement.
- Any index produced by a publishing organization is separated from any news-gathering operations by a verifiable and auditable "Chinese wall."

Auditing Process

The white paper recommends a formal auditing process for both the energy companies providing data and the companies publishing price indices.

The CCRO recommends that independent audits be conducted by each company publishing indices at its expense at least annually to determine the following:

- The data are properly collected and stored in compliance with all contractual arrangements with data providers, including confidentiality arrangements. Specifically, the data are properly protected from release and misuse at all levels.
- The methodology established and published by the index developer is the same as that used to calculate and publish the actual index.

- The methodology established and published by the index developer satisfies the attribute of robustness as defined by the index developer in accordance with the principles in this white paper.
- Periodic tests are conducted to verify that the process used to derive published indices is accurate, objective, and reliable.

The CCRO also recommends a formal auditing procedure for the companies submitting data for index publication:

> An independent (internal or external) audit group should review the data gathering and submission process at least annually, verifying the proper implementation of and adherence to the data gathering and submission process that the company has established. This audit should be conducted at the expense of the data provider by a qualified individual, i.e., Certified Public Accountant or Certified Internal Auditor. The pass/fail results of the audit should be made available to the index developers upon request. In the event of a failed audit, the data provider should be able to reaudit once appropriate process changes are made.

Staff commends the CCRO on its efforts to reform the index price reporting process. Although the CCRO white paper is a recommendation for best practices and not a binding commitment by its member companies, it addresses the fundamental problems in the process and provides feasible

solutions. The necessary data to compile an accurate and reliable index identified by the CCRO are nearly identical to those proposed by Staff later in this chapter.[34]

The CCRO paper has directly addressed the critical pieces of information for ensuring an accurate index: providing the counterparty and buy/sell information for every trade. The paper recognizes the commercial sensitivity of such information, but proposes amending existing energy contracts to allow for its provision, provided the confidentiality is preserved by the index publishers through explicit contracts. As discussed throughout this chapter, without the ability to cross-check reported prices and volumes, the published indices will not be reliable. As noted by Platts in its February 10, 2003 call to action:

> Information on counterparties, buy/sell indicators and time stamps is critical to the process of verifying data. This information will help Platts in its efforts to confirm such data characteristics as completeness (by enabling publishers to detect a provider's omission of certain deals) and accuracy, and it will serve as a check against double counting. In fact, counterparty information is one of the

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[34] It is Staff's position that one critical piece of information missing from the CCRO proposal is the time stamp of when the transaction was made. Staff understands this to be an IT issue that could be worked out. The time stamp would further aid in cross-checking transactions and assessing whether an outlier should be rejected (since prices may move significantly within a day of trading) when calculating a price index.

> best means for publishers to identify inaccurate or, indeed, fictional transactions. The industry should make the provision of counterparty names a top priority and resolve confidentiality or other issues that some companies say prevent them from providing that information.

It is Staff's position that if both the index publisher and all of the energy companies providing data followed the best practices described in the CCRO paper, the resulting index would meet the standards proposed by Staff for an index that can be used for Commission-jurisdictional transactions. Staff recognizes that the CCRO cannot, nor does it attempt to, make its recommendations mandatory. Staff commends the CCRO on putting forth a serious proposal that is already part of the discussion on fixing the energy indices and will continue to be part of the solution. As discussed in the "Staff Recommendation to the Commission," many of the best practices described by the CCRO are the same as those Staff recommends be made mandatory for Commission-jurisdictional companies.

Changes by the Trade Press in the Price Index Methodologies

In the Initial Report, Staff noted that the Trade Press announced changes to its data gathering procedures in order to improve the accuracy of the reported indices. In addition, the Trade Press has continued with those efforts since the Initial Report was issued.

Platts

In the Initial Report, Staff noted that Plans had proposed refinements to its power market methodology.[35] On September 2, 2002, Platts proposed refinements to its natural gas price index methodology. Those changes included the following:

To improve the quality of information it receives for each transaction, Platts will be asking market participants to provide quantity and price, the name of the counterparty, whether the reporting company was the buyer or seller, and the time at which the transaction was completed. Currently, Platts obtains these data from some (but not all) market participants. Platts also is considering other refinements to increase the quality of its gas pricing data and welcomes industry input before any changes are made. Changes under consideration include the following:

- Using physical basis transactions in its monthly surveys. Basis deals transacted during the last 3 days of trading of the near-month NYMEX gas futures contract would be included with fixed-price physical deals. Among other things, Platts solicits input on whether physical basis transactions generally are compatible with fixed-price deals in some regional markets but not others.

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[35] Initial Report at p. 37 (fn 44).

- Requiring the signature of a senior company official to verify the accuracy of price data submitted to Platts.
- Obtaining data from back offices rather than trading desks.[36]

On October 28, 2002, Platts announced that it was adopting steps to strengthen the price survey of the U.S. electricity markets and that it was making similar changes to its methodology for natural gas indexes and assessments.[37]

On February 10, 2003, Platts published a statement on its views of the necessary reforms in the price index reporting process, *Market Reporting in North American Natural Gas and Electricity Recommendations for Restoring Trust and Transparency: A Call To Action.* Platts made the following recommendations:

- Market participants should provide data from a central source in a mid- or back-office operation that would have the responsibility for confirming the accuracy and completeness of the data provided to price-reporting organizations such as Platts.
- Market participants should submit detailed transactional level data—not aggregated data.
- Market participants should provide counterparty information for each transaction

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[36] *Gas Daily*, Proposed Refinements To US Gas Price Methodology (September 2, 2002).

[37] *Megawatt Daily*, October 28, 2002.

reported. The naming of counterparties offers an important check for verifying the completeness and accuracy of trade data.

- Market participants should provide written certification from a senior level official, such as a chief risk officer, attesting to the accuracy and completeness of the information reported to publishers. This certification would be renewed periodically.

- Market participants should understand that these measures and others noted below can only serve to re-establish confidence and credibility in price reporting on the North American gas and electricity markets.

Platts described the high-quality data that it is seeking from market participants in order to ensure accurate price indices:

> In North America, Platts is asking electricity market participants to provide for each transaction the delivery location, trade date, start flow date, end flow date, peak or off-peak, physical or financial, price ($/MWh), volume (MW), transaction time, buy or sell indicator, and counterparty. In the gas market, Platts asks market participants to provide for each transaction the delivery location, the trade date, flow date, price ($/MMBtu), volume (Mcf), and counterparty, and to state whether the deal is fixed-price

physical or basis and whether it is a buy or sell transaction.[38]

Platts further described the need for critical pieces of information such as counterparties to each trade:

> Information on counterparties, buy/sell indicators and time stamps is critical to the process of verifying data. This information will help Platts in its efforts to confirm such data characteristics as completeness (by enabling publishers to detect a provider's omission of certain deals) and accuracy, and it will serve as a check against double counting. In fact, counterparty information is one of the best means for publishers to identify inaccurate or, indeed, fictional transactions. The industry should make the provision of counterparty names a top priority and resolve confidentiality or other issues that some companies say prevent them from providing that information.
>
> Moreover, additional information such as counterparty names, buy/sell indicators and time stamps may well be useful to determine a market price and to produce better benchmarks in relatively illiquid markets or during unusual trading conditions when markets are under stress.[39]

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[38] *Market Reporting in North American Natural Gas and Electricity—Recommendations for Restoring Trust and Transparency: A Call To Action.*

[39] Id.

Platts acknowledged that, due to the decline in energy trading and the fact that some companies have ceased reporting trade data to the Trade Press, at some trading points there is very little data from which to construct an index:

> Some US gas and electricity pricing points currently are showing little or even no trading. Platts editors can use their experience to assess the representative prices at which limited trading did occur or, in the absence of trades, would have occurred.
>
> Platts is committed to providing as much transparency as possible on how such assessments are made and what method is used to produce a given price. In US gas markets in recent months, Platts has used its traditional index methods for trading points that are sufficiently liquid and a broader assessment process when we have concluded that transactional data alone provides an insufficient base for analysis. Once the market shows signs of stabilizing, Platts will provide a clear statement on how it intends to assess US gas markets in the longer term.[40]

Platts recognizes the value of showing the degree of liquidity in the markets for which it publishes price indices and states that it is currently publishing the total trading volume for some of its indices and is moving toward publishing volumes for more of its price indices:

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[40] Id.

> Platts agrees with those who assert that the degree of liquidity of a given market should be disclosed by publishers in some fashion. It already provides information on liquidity for many of its US gas and electric benchmarks, and is moving toward expanding the provision of that type of information. While volumetric information may be subject to misinterpretation or may even encourage attempts to manipulate markets, Platts is committed to providing a window on the depth of the trading points it covers.[41]

NGI

On September 16, 2002, NGI announced that it was proposing modifications to its index price methodology for both its daily and weekly indices. The proposed modifications were designed to increase the accuracy of the reported indices and more accurately reflect the way market participants are doing business. Specifically, NGI recognized the move away from negotiated fixed-price deals during bid week toward basis trading for the monthly market. NGI also stated that for several years they have been aware that some portion of the deals reported to them as fixed price have, in fact, been physical basis transactions that it has struggled to identify and remove from its calculations.

NGI proposed including the basis deals in the index and offered two suggestions for doing so:

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[41] Id.

(1) the basis trades would include physical basis deals done during the last 3 days of the NYMEX trading before the near-month contract expires or (2) the basis trades would only include quotes from the last day of trading or the settlement day.

In addition, NGI asked its survey participants to report, wherever possible, counterparty information on baseload transactions and the date and/or time of the transaction (in addition to price and quantity). NGI states that the counterparty and time/date information helps them verify that reported transactions meet their survey criteria and helps to resolve questions regarding the veracity of certain data when outliers in the data are encountered. Moreover, NGI stated that a large portion of reporting companies were currently including counterparty and or date/time information.

IntercontinentalExchange

ICE is now computing indices, especially for next-day products, based on a volume-weighted average of the complete set of trades on its platform. This provides a way to avoid the sampling bias, manipulation, and verification problems associated with conventional energy indices constructed by the Trade Press and suggests that it is feasible to impose standards on indices to ensure their objectivity. In fact, ICE is encouraging the creation of swap contracts based on its next-day gas and power indices ("ICE swaps"). ICE has retained Ernst and Young, LLP to audit its procedures and verify to the marketplace the integrity of its process.

In October 2002, ICE announced the formation of the 10x Group, which publishes electricity and natural gas price indices directly from trades on the ICE platform. In addition, ICE has added a trade confirmation process, eConfirm, which has the ability to confirm trades conducted at over 100 over-the-counter brokerages and trading arenas. ICE describes the system as follows:

> The eConfirm system matches a participant's trade data to its counter party's data to execute confirmations and identify discrepancies in real time, contrasting to the manual method of confirming trades and reconciling voice broker invoices which may typically take days or weeks. eConfirm matched trades are considered to be legally binding under identical Intercontinental participant agreements that counter parties must execute in order to be active on the system.[42]

ICE states that as of February 19, 2003, there were 28 energy companies using eConfirm and those companies had used eConfirm to confirm more than 75,000 trades occurring at 49 different brokers and execution venues. Along with the trades made over the ICE platform, those trades confirmed by the eConfirm system are used in the calculation of the 10x published price indices. In addition, ICE announced an agreement with Prebon (a large energy product voice broker) in

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[42] IntercontinentalExchange press release, February 19, 2003.

which Prebon will use the eConfirm system for all of its energy trades, and those trades will be included in the database used in calculating ICE's price indices.

In short, ICE (through its 10x subsidiary) is in the process of constructing price indices that are based solely on actual, verifiable trades from its platform or through its confirmation process. Moreover, with the agreement of a major voice broker to use ICE's confirmation system, the volume of trades reflected in its published indices is increasing. Staff is encouraged by this development and sees it as an important part of the necessary reforms to the price index reporting process.

Staff Reaction to the Proposed Changes

Staff commended the Trade Press's efforts to increase the accuracy of the indices included in the Initial Report. The further revisions to the process for reporting trade data are also positive developments. Combined with the establishment of internal controls on the part of the companies providing data to the Trade Press, the entire process has improved significantly. It is Staff's position, however, that the process is fundamentally flawed because the Trade Press data are still not subject to independent verification. In order for the published indices to be reliable, there must be a way to audit the entire information chain. The chain consists of (1) the actual trades, (2) the data provided by the companies to the reporting firms, (3) the data used by the reporting firms to calculate the indices, and (4) the method for calculating the indices.

As discussed in the Initial Report, the Trade Press has been willing to describe its methodology for calculating the prices despite its unwillingness to make the data available to Staff or anyone else for auditing. Combined with the industry changes in the data reporting process and the Commission's data filing requirements, three of the four components of the information chain (the actual trades, the data provided by the companies to the reporting firms, and the method for calculating the indices) could be audited. However, as long as the companies publishing the indices continue to refuse to disclose the actual calculations of the published price indices, the information chain cannot be audited and the Commission cannot verify the accuracy of the published indices. Therefore, Staff recommends that only price indices calculated from actual trades that can be verified by the Commission should be used as the basis for any Commission-approved sales of natural gas or electricity.

Future Index Reporting

As noted throughout this chapter, there have been significant improvements in the price-reporting process on both sides. Companies have moved the trade data reporting function to the risk management offices. The trading data flow directly from the companies' deal-capture system to the risk management office, and the accuracy of the data submitted to the Trade Press is verified and certified by the chief risk officer. The Trade Press is now requiring counterparty information for all data they receive to ensure the validity of the data

and the accuracy of the published price indices. The Trade Press has long held the position that this is necessary, and Staff strongly agrees. Electronic platforms such as ICE have begun publishing indices based on trades coming directly from the platform.

It is important for index construction to be objective and address the fundamental problems that have been identified. The problems of sampling bias, manipulation, and verification are not inherently difficult and can be overcome with a fresh perspective and at a relatively modest cost.

A variety of trading systems exist, including electronic platforms, voice brokers, hybrid markets, and trading floors. However, in all of these designs it is feasible to compute the average price over a specified period of time. There is no reason for prices to reflect the impression of individual traders. Instead, they should reflect the reality of the actual trades. The approach taken by ICE to compute its indices by providing the volume-weighted average execution price for the specified period applies not only to ICE and other electronic platforms, but also to individual voice brokers, hybrid markets (a combination of a voice broker and an electronic platform), and even trading floors. This raises the question of how to enforce these standards.

Any marketer or broker could be required by "anti-fraud" regulations or legislation to provide accurate index information (such as average prices and volume). This should be a basic requirement for a market center such as a trading platform, broker,

or trading floor. Although not all market contexts have such reporting requirements (e.g., foreign exchange trading does not have these restrictions), they are important for domestic energy markets in light of the extent of reliance on index prices for pricing physical flows and the small number of market participants for many products (which leads to the potential for market manipulation). Similarly, our discussion of (ex post) transparency in Chapter IX emphasized the value of requiring timely trade reports; this could be enforced by requiring that these reports be subject to appropriate anti-fraud standards. The data and informational requirements for trade reporting are much stronger than those for index reporting, which is actually an aggregate form of trade reporting.

Services that purport to measure index prices across platforms or voice brokers should be governed by the same anti-fraud rules. Acceptable indices in this context should also provide appropriate volume-weighted averages to aggregate across portions of the marketplace. The computation of such measures would require average prices and volumes from those markets and/or brokers, whose prices are included in the benchmark.

This raises the question about whether reasonable indices could be computed solely from a single online platform or two (such as ICE and TradeSpark) with an automated computational process. Because such an index would only reflect online transactions, it would not reflect all of the

buying and selling of a particular product. Staff recognizes that in a perfectly functioning market, arbitrage would drive the prices between on- and off-line exchanges together. However, Staff has learned from this investigation that energy markets are not always perfectly functioning. As such, the ideal index should capture as much of the entire universe of trades as possible. Along that line, as discussed earlier in this chapter, at least one online exchange has entered into an agreement with a major voice broker that would include the broker's transactions in its price index.

Staff Recommendations to the Commission

Staff makes the following recommendations for the Commission to consider regarding the characteristics of any future published price indices and Commission action to ensure the accuracy and integrity of price indices:

1. Any company publishing price indices to be used as a basis for Commission-jurisdictional transactions, e.g., natural gas pipeline balancing or market-based electricity pricing, should be subject to audit by the Commission to ensure the accuracy of the data going in and the calculations themselves. That is, an index that meets the requirements established by the Commission for use in Commission-jurisdictional transactions would have the Commission's seal of approval. All data used in the index calculation, including data that are thrown out (e.g., outliers, questionable reported trades, trades reported without counterparty verification), should be available to the Commission. In the Initial Report, Staff

described the verification, auditing, and oversight procedures associated with NYMEX energy trading. Staff suggests that these procedures should serve as a model for price index reporting in the future. The characteristics of NYMEX and its price index calculations are as follows:

- NYMEX is an organized exchange subject to CFTC regulation.
- NYMEX is required by the CFTC to maintain and enforce an internal auditing mechanism and to maintain records of trading activity so a clear audit trail is possible.
- NYMEX is required to conduct, with CFTC oversight, market surveillance and trade surveillance designed to prevent market manipulation and other anti-competitive activity.
- The Futures Trading Practices Act requires that trade information be submitted to NYMEX and time-stamped within 1 minute of a trade. NYMEX requires its traders to use a special trading pad that provides NYMEX with an unalterable audit trail through the use of individually numbered, time-stamped computer scans of trader records.

2. The Commission should condition all market-based rate and blanket natural gas sales certificate authority on companies providing complete, accurate, and honest information to any entity that publishes price indices. The information must be detailed transactional data that includes:

- Price.
- Volume.
- Delivery point.
- Duration (i.e., hourly, daily, monthly).
- Date and time (to the minute) of the transaction.
- Whether the transaction is a purchase or a sale.
- Counterparty.

It must be clear that manipulating index prices is a violation of the tariff and grounds for revoking market-based pricing or blanket natural gas sales authority and for requiring disgorgement of any profits resulting from the manipulation.

3. The Commission should require that jurisdictional entities retain all information concerning their transactions and any and all information submitted to any entity publishing natural gas or electricity price indices and provide it to the Commission upon demand. Such information would promote more transparent markets and reduce incentives to manipulate or attempt to manipulate energy markets. For example, the CFTC requires that "[a]ll books and records required to be kept by the Act or by these regulations shall be kept for a period of 5 years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period. All such books and records shall be open to

inspection by any representative of the [CFTC] or the United States Department of Justice."[43]

4. The Commission should approve standard product definitions for published natural gas and electricity price indices used in jurisdictional transactions and standard methodologies for calculating the price indices.

Staff has a specific recommendation for an alternative to the published price indices that meets the criteria specified above. That is, the Commission should require any jurisdictional transaction that is based on a published price index to be taken from an index that is calculated directly from the trade data from one or more many-to-many electronic exchanges and voice brokers that meet all of the criteria specified above. The exchange or voice broker must be audited by an outside entity, and the audit must be subject to Commission review. An index calculated as such would be free from the ability and incentive of traders to manipulate the prices and would be feasible in terms of implementation cost, time, and verification.

Staff further recommends that the process for establishing standards for price reporting be established by the Commission, with input and cooperation from the energy industry and the price reporting firms. In addition, other government agencies, such as the CFTC and the Energy

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[43] Commodity Futures Trading Commission Commodities Exchange Act Regulation 1.31.

Information Administration, should be involved in the process. The process should begin with a technical conference at FERC.[44]

As described throughout this chapter, there are a significant number of companies whose employees manipulated or attempted to manipulate the published price indices by reporting inaccurate or misleading data to the Trade Press. Those manipulations and attempts to manipulate the published price indices may involve criminal violations. In fact, as of February 28, 2003, United States Attorneys have filed criminal charges against two former traders (one from Dynegy and one from El Paso Merchant Energy). Staff has provided the United States Attorneys' Offices any relevant information regarding these cases and will continue to do so. In addition, Staff has provided other government agencies (including the CFTC and the SEC) with any relevant information regarding their investigations of index price reporting and will continue to do so.

Also, as described in this chapter, many of those companies have taken internal measures to correct the problem, such as firing or disciplining employees who manipulated or attempted to manipulate the indices; moving the reporting process away from the trading desk and toward the risk management office; and having a company officer attest to the accuracy of data reported to a trade publication.

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[44] Commission Staff has scheduled a technical conference relating to the issue for April 24, 2003.

Staff recognizes the importance of accurate price indices to the overall health of competitive energy markets. The companies discussed at length in this chapter are significant participants in U.S. electricity and natural gas markets. In order for the published price indices to be accurate and credible, they must receive complete and accurate information from these companies. As such, Staff recommends that the following companies be required to show the Commission that they have fixed their internal processes for reporting trading data to the Trade Press:

- Dynegy
- Aquila
- AEP
- El Paso Merchant Energy
- Williams
- Reliant
- Duke
- CMS
- Mirant
- Coral
- Sempra Energy Trading

At a minimum, these companies need to show the following:

- Those employees, including trading desk heads and managers, who participated in

manipulations or attempted manipulations of the published price indices have been disciplined.

- The company has a clear code of conduct in place for reporting price information.
- All trade data reporting is done by an entity within the company that does not have a financial interest in the published index (preferably the chief risk officer).
- The company is fully cooperating with any government agency investigating its past price reporting.

Conclusion

The process for reporting natural gas price indices was fundamentally flawed and must be fixed. Traders had the ability and incentive to manipulate the published indices and they did so. Given the degree of systematic manipulation described in this chapter, the published indices could not possibly be accurate based solely on the publishers' editorial judgement, the traders' feel for the market, or the hope that competing traders could offset each other's false reporting.

Staff began the investigation looking for evidence of energy price manipulation in the West. Staff found evidence of manipulation (direct and indirect) of the published natural gas price indices at significant trading points all over the United States—the U.S.-Canada border in Washington (El Paso), Oregon and San Francisco (Dynegy), the Gulf Coast (AEP), the Great Lakes (CMS), the

Northeast (Williams), the Henry Hub in Louisiana (Enron), and the Southern California-Arizona Border (Enron and Reliant).

In many cases, electricity prices are directly (through explicit contracts) or indirectly (through the generation costs of electricity suppliers) determined by natural gas prices. Therefore, the manipulation of natural gas prices also affected electricity prices. As the agency of the U.S. Government with the statutory obligation to ensure just and reasonable electricity rates, the Commission cannot rely on a recipe of offsetting false reports, traders' feel for the market, and editorial judgement for accurate price indices.

As noted in this chapter, there has been a movement within the industry to fundamentally reform the price reporting process. Suggestions for reform and tangible reforms have come from market participants, risk officers, the trade publications themselves, new entrants into the price reporting business, government agencies, consumer groups, and others. Moreover, Commission Staff will convene a technical conference on April 24, 2003 on the issue of price reporting, bringing together these parties and working toward a solution. It is clear that the parties involved recognize the problem, agree that a competitive energy market must have accurate price indices to function properly, and are willing to make changes to the process in order to ensure that the indices are accurate and reliable.

VII. WASH TRADING ON ENRONONLINE

Several energy trading companies, including CMS Energy, Dynegy, Williams, and Reliant, have admitted publicly to engaging in "wash trades." As a result of our analysis of EnronOnline (EOL) data, Staff, with assistance from Hendrik Bessembinder, Blaine Huntsman Chair in Finance, Eccles Business School, University of Utah, has also identified Enron and others as participants in wash trading activities. In fact, Enron's use of its EOL platform created a fertile ground for wash trading that resulted in multiple forms of manipulation in energy markets.

The term "wash trade" is generally defined as a *prearranged* pair of trades of the same good between the same parties, involving no economic risk and no net change in beneficial ownership. These trades expose the parties to no monetary risk and serve no legitimate business purpose. Potential motives for wash trading are numerous. Wash trades might be used to create the illusion that a market is liquid and active, or to increase reported trading revenue figures. Wash trades might be arranged at prices that diverge from the prevailing market in an attempt to send false signals to other market participants. Alternatively, the intent might be to affect the average or index price reported for a market, which in turn could benefit a derivatives position or affect the magnitude of payments on a contract linked to the index price.

In general, wash trading is viewed as damaging to the integrity of a market and has the potential to mislead a host of market stakeholders (including competitors, regulators, analysts, and investors) through the various forms of manipulation outlined above. Although the Commission has no regulations on wash trading, wash trades are prohibited in markets regulated by the Commodity Futures Trading Commission. This chapter provides statistical evidence indicating that wash trading in energy products was more common than previously recognized.

Wash Trading on EnronOnline

The statistical portion of this chapter describes wash trades in natural gas and electricity products on the EOL trading platform from January 2000 to November 2001. This study focuses on EOL trades in which both the buy and sell transactions were recorded in a single database. It seems likely, though, that market participants who intend to use wash trades for illegitimate purposes would be inclined to use methods that did not create a single electronic record of both transactions. The alternatives might include direct bilateral negotiation of both trades by telephone, or completion of one leg by telephone or an alternate electronic platform while completing the other leg on EOL. Our definition of wash trading considers trades that occurred within the same product, at the same price, in the same volume, and at nearly the same time (within 2 minutes of one another).

It should be recognized that a company might enter an offsetting pair of trades on EOL for legitimate business purposes. For example, a company anticipating unseasonably warm weather might purchase a quantity of power, only to resell it later as actual weather conditions are milder. Therefore, it is possible that this report includes some "false positives"—paired trades that appear to be inappropriate wash trades but were not. However, given the facts in the specific examples of wash trading described herein, we believe the manipulative nature of these examples is obvious.

Choice Markets

EOL market makers are traders assigned to always quote both a bid price and an offer price, representing Enron's willingness to always buy or sell gas during market hours. Our data analysis and interviews with market makers indicate that they sometimes elected to set the bid-offer spread to zero, which they referred to as making a "choice market." Choice markets may, in effect, have been an invitation to EOL customers to engage in wash trading. The raw data used in our analysis do not include bid and ask quotes, so it is not possible to directly identify periods of choice (zero spread) markets. However, Staff identified all sequences of trades that occurred during likely choice markets based on the following criteria: (1) all trades in the sequence occurred at identical prices, (2) at least one trade in the sequence was an EOL buy and at least one was an EOL sell, (3) the sequence contained at least four trades,

and (4) all trades in the sequence are for the same product at the same volume.

Tables VII-1 and VII-2 provide information about EOL trading activity during choice market periods. Table VII-1 reports activity by calendar month, revealing that choice market trading on EOL increased steadily over time. In fact, 45 percent of all choice market trading in gas products and 54 percent of all choice market trading in electricity markets occurred during the last 3 months (September to November 2001) of the 21-month sample. These 3 months coincide with the period of time leading up to Enron's filing for bankruptcy.

The reasons for this upward trend in choice market trading activity are unclear; however, it may have been an attempt to prop up or otherwise maintain Enron's presence in the market.

Table VII-1. Trades Completed During Choice Markets, by Month

Gas Trades				Power Trades			
Year	Month	Choice Trades	Percent of Total	Year	Month	Choice Trade	Percent of Total
2000	1	749	1.4	2000	1	82	0.5
2000	2	1024	1.9	2000	2	134	0.8
2000	3	1835	3.4	2000	3	195	1.2
2000	4	958	1.8	2000	4	101	0.6
2000	5	887	1.7	2000	5	41	0.2
2000	6	776	1.5	2000	6	23	0.1
2000	7	754	1.4	2000	7	102	0.6
2000	8	1209	2.3	2000	8	222	1.3
2000	9	1046	2.0	2000	9	268	1.6
2000	10	1126	2.1	2000	10	513	3.1
2000	11	1256	2.4	2000	11	165	1.0
2000	12	707	1.3	2000	12	36	0.2

Gas Trades				Power Trades			
Year	Month	Choice Trades	Percent of Total	Year	Month	Choice Trade	Percent of Total
2001	1	1218	2.3	2001	1	344	2.1
2001	2	1314	2.5	2001	2	378	2.3
2001	3	2844	5.3	2001	3	536	3.2
2001	4	1656	3.1	2001	4	412	2.5
2001	5	2015	3.8	2001	5	452	2.7
2001	6	2117	4.0	2001	6	614	3.7
2001	7	2129	4.0	2001	7	1129	6.7
2001	8	3721	7.0	2001	8	1894	11.3
2001	9	6859	12.8	2001	9	2366	14.1
2001	10	10511	19.7	2001	10	4534	27.0
2001	11	6734	12.6	2001	11	2231	13.3
Total		53,445		Total		16,772	

Choice market trades were identified as a sequence of at least four consecutive trades at the same price, with at least one buy and one sell included in the sequence. The table reports the number of EOL gas and power trades completed during choice markets, by trading month, from January 2000 to November 2001.

Table VII-2 reports the number of choice market trades completed by several individual Enron market makers. Our analysis indicates that certain market makers created choice markets rather frequently. In gas products, 19,564 choice market trades (36.6 percent of the total) were executed by a single EOL market maker, and 6,285 choice market trades (11.8 percent of the total) were executed by a second EOL market maker. In power products, the most choice market trades executed by any single EOL market maker was 1,814, which was 10.8 percent of the total choice market trades. It is important to note that the

total gas trades in choice markets exceed the power trades by greater than 3 to 1. This could be explained by the greater volume of gas trading that occurred on EOL as compared to power trading.

Table VII-2. Trades Executed During Choice Markets, by Trader

Gas Trades		Power Trades	
Enron Trader	Total Trades During Choice Markets	Enron Trader	Total Trades During Choice Markets
Trader A	19,564	Trader K	1814
Trader B	6285	Trader L	1373
Trader C	2567	Trader M	1219
Trader D	2431	Trader N	1159
Trader E	2382	Trader 0	1008
Trader F	1710	Trader P	934
Trader G	1608	Trader Q	861
Trader H	1127	Trader R	834
Trader I	884	Trader S	731
Trader J	823	Trader T	612
All Traders	53,445	All Traders	16,772

The table reports the top 10 Enron gas and electricity traders in terms of the total trades executed during choice markets between January 2000 and November 2001.

Wash Trades Within Choice Markets

Using the choice market data shown above, Staff identified all wash trade pairs that occurred within these choice market events based on the additional criteria that both legs of potential wash trades involved the same counterparty and occurred

within 2 minutes of each other. Since these trades occurred during choice markets, the previously mentioned criteria that these trades involve the same product, same price, and same volume also apply.

By focusing only on wash trades that occurred within choice markets and within a sequence of at least four trades, we significantly limited the total number of wash trades identified. For example, a deliberate wash trade that included only a single pair of trades between two divergently priced transactions would not have met our criteria for a choice market nor, consequently, for a wash trade. However, by focusing on wash trades that occur within choice markets and within a sequence of four or more trades, we significantly increase the likelihood that the trades we select are indeed wash trades—a single pair of trades not part of a sequence of four or more trades would not be considered.

Tables VII-3 through VII-8 provide information about wash trades completed during periods of choice markets. It is important to note that each wash trade represents a matching pair of trades. Therefore, for a 'trader to complete 10 wash trades, he would actually need to execute 20 trades (10 buys and 10 sells). These trade pairs all involved the same counterparty, the same quantity, and the same product, and occurred within 2 minutes of each other. Also, since they occurred during a period of choice markets as previously defined, each leg of the wash trade as well as any intervening trades occurred at a common price.

The fact that these trades occurred during choice markets makes it likely that they were intended to inflate reported trading volumes and/or influence market indices.

Table VII-3 reports the number of wash trades by month. In general, these data reveal a trend in which more wash trades occurred later in time. Only 5 percent of gas wash trades and 1 percent of power wash trades occurred during the first 4 months (January to April 2000) examined, while 42 percent of gas wash trades and 46 percent of power wash trades occurred during the last 4 months (August to November 2001) examined. An exception is the month of October 2000 (highlighted in bold), when 27.5 percent of power wash trades occurred.[1]

Table VII-3. Wash Trades Completed During Choice Markets, by Month

Gas Trades				Power Trades			
Year	Month	Wash Trades	Percent of Total	Year	Month	Wash Trades	Percent of Total
2000	1	1	0.3	2000	1	0	0.0
2000	2	4	1.1	2000	2	3	0.8
2000	3	6	1.6	2000	3	1	0.3
2000	4	8	2.1	2000	4	1	0.3

[1] This cluster of wash trading is linked to a previously noted promotional campaign in which a big screen television was awarded as a prize to the counterparty that generated the most trading activity. See "Initial Report on Company-Specific Separate Proceedings and Generic Reevaluations: Published Natural Gas Price Data and Enron Trading Strategies," Federal Energy Regulatory Commission Staff Report, August 2002, p. 54.

Gas Trades				Power Trades			
Year	Month	Wash Trades	Percent of Total	Year	Month	Wash Trades	Percent of Total
2000	5	3	0.8	2000	5	0	0.0
2000	6	2	0.5	2000	6	0	0.0
2000	7	1	0.3	2000	7	11	2.8
2000	8	11	2.9	2000	8	10	2.6
2000	9	8	2.1	2000	9	5	1.3
2000	10	5	1.3	2000	10	106	27.5
2000	11	11	2.9	2000	11	0	0.0
2000	12	19	5.0	2000	12	1	0.3
2001	1	6	1.6	2001	1	5	1.3
2001	2	13	3.4	2001	2	5	1.3
2001	3	38	10.1	2001	3	13	3.4
2001	4	13	3.4	2001	4	6	1.6
2001	5	15	4.0	2001	5	8	2.1
2001	6	29	7.7	2001	6	12	3.1
2001	7	25	6.6	2001	7	23	6.0
2001	8	35	9.3	2001	8	42	10.9
2001	9	42	11.1	2001	9	46	11.9
2001	10	50	13.2	2001	10	49	12.7
2001	11	33	8.7	2001	11	39	10.1
Total		378		Total		386	

The table reports the number of wash EOL gas and power trades completed during choice markets, by trading month, from January 2000 to November 2001.

Table VII-4 reports the EOL market makers involved in the most wash trades. In gas products, 1 trader executed 111 wash trades (29.4 percent of the total) and a second trader executed 73 wash trades (19.3 percent of the total). In power markets, 1 EOL market maker executed 102 wash trades (26.4 percent of the total), a second market maker executed 36 wash trades (9.3 percent of the total), and a third completed 32 wash trades (8.3 percent of the total). The fact that an individual trader would be linked to more than 25 percent of

all wash trades in a product is significant evidence that wash trading on EOL was not simply a coincidence or a random occurrence.

Table VII-4. Wash Trades Completed During Choice Markets, by Trader

Gas Trades			Power Trades		
Enron Trader	Total Wash Trades During Choice Markets	Percent of Total	Enron Trader	Total Wash Trades During Choice Markets	Percent of Total
Trader A	111	29.4	Trader K	102	26.4
Trader B	73	19.3	Trader L	36	9.3
Trader C	24	6.3	Trader M	32	8.3
Trader D	16	4.2	Trader N	16	4.-1
Trader E	13	3.4	Trader 0	15	3.9
Trader F	11	2.9	Trader P	13	3.4
Trader G	11	2.9	Trader Q	12	3.1
Trader H	10	2.6	Trader R	12	3.1
Trader I	10	2.6	Trader S	11	2.8
Trader J	9	2.4	Trader T	10	2.6
All Traders	378		All Traders	386	

The table reports he numbers of wash trades during choice markets between January 2000 and November 2001 for the 10 most frequent Enron traders.

Table VII-5 reports the counterparties who engaged in the largest numbers of EOL wash trades. In gas products, Entergy-Koch Trading, LP completed 61 wash trades (16.1 percent of the total). In power products, Aquila Energy Marketing Corporation completed 112 wash trades (29 percent of the total). Again, the high percentage of involvement in wash transactions is significant evidence that certain EOL

counterparties regularly and knowingly participated in wash trades.

Table VII-5. Wash Trades Completed During Choice Markets, by Counterparty

Gas Trades			Power Trades		
Counterparty	Total Wash Trades During Choice Markets	Percent of Total	Counterparty	Total Wash Trades During Choice Markets	Percent of Total
Entergy-Koch Trading, LP	61	16.1	Aquila Energy Marketing Corporation	112	29.0
Reliant Energy Services, Inc.	25	6.6	Williams Energy Marketing & Trading Comp	27	7.0
Cook Inlet Energy Supply L.L.C.	22	5.8	Idaho Power Company, dba IDACORP Energy	25	6.5
AEP Energy Services, Inc.	21	5.6	Cinergy Services, Inc.	13	3.4
MidAmerican Energy Company	21	5.6	American Electric Power Service Corporat	9	2.3
Mieco Inc.	19	5.0	Dynegy UK Limited	9	2.3
PG&E Energy Trading-Gas Corporation	15	4.0	EPMI Short Term New England (Enron Affiliate)	9	2.3
Coral Energy Holding, L.P.	11	2.9	El Paso Merchant Energy, L.P.	8	2.1

Gas Trades			Power Trades		
Counterparty	Total Wash Trades During Choice Markets	Percent of Total	Counterparty	Total Wash Trades During Choice Markets	Percent of Total
Aquila Energy Marketing Corporation	9	2.4	IDACORP Energy L.P.	8	2.1
Other Companies	174	46.0	Other Companies	166	43.0
Total	378		Total	386	

The table reports the top Enron counterparties in terms of the total wash trades completed during choice markets between January 2000 and November 2001.

Table VII-6 reports delivery locations for wash trades. Some (34 percent of gas and 17 percent of power) wash trades were for financial products without physical delivery locations. Henry Hub was by far the most common delivery point for gas wash trades (31 percent of the total), while Mid-Columbia (24 percent), Cinergy (17 percent), and the California-Oregon Border (14 percent) were the most frequent delivery points for power wash trades.

Table VII-6. Wash Trades Completed During Choice Markets, by Delivery Location

Gas Trades			Power Trades		
Location	Wash Trades at Location	Percent at Location	Location	Wash Trades at Location	Percent at Location
Finan-	129	34.1	Mid	92	23.8

Gas Trades			Power Trades		
Location	Wash Trades at Location	Percent at Location	Location	Wash Trades at Location	Percent at Location
cial			Columbia		
HHub	118	31.2	Financial	66	17.1
NGPL NICOR	24	6.3	Cinergy	54	14.0
SoCal Topock EPNG	20	5.3	COB North/ South	49	12.7
NBP	11	2.9	Palo Verde	30	7.8
Opal	10	2.6	German Grid	23	6.0
ANR SE Transmission	8	2.1	PJM Western Hub	18	4.7
NIT - AECO	8	2.1	Entergy	13	3.4
NNG Demarc	8	2.1	NEPOOL -PTF Power (3/1/00)	11	2.8
EPNG Keystone Pool	6	1.6	NBP Trans Inc	10	2.6
Other Locations	39	9.5	Other Locations	20	5.2
Total	378		Total	386	

The table reports the 10 most common delivery locations for EOL gas and electricity wash trades completed during choice markets between January 2000 and November 2001. The label "Financial" is used for any wash trades in which a delivery point was not specified.

Table VII-7 reports the individual trading days with the most wash trades in a single product and involving a single counterparty. The heaviest wash trading of gas products occurred on March 26, 2001, when Entergy-Koch Trading, LP completed 12 pairs of wash trades in the next-day contract for physical delivery at Henry Hub. The details of this series of wash trades are provided as an example in Table VII-8, which focuses on a series of 24 trades that occurred in a 5-minute interval on March 26, 2001. With respect to this occurrence, it is interesting that no counterparty other than Entergy-Koch Trading, LP completed any transactions in this EOL product within ±30 minutes of the wash trades. It is difficult to identify any legitimate business reason why Entergy-Koch Trading, LP would need to complete 12 buys and 12 offsetting sells in the same gas product in a period of less than 10 minutes, especially when no other company made any EOL trades in this product and the price remained unchanged. Our analysis also revealed that the trades were executed by three separate Entergy-Koch Trading, LP traders. One of the three Entergy-Koch Trading, LP traders always acted as the buyer or seller in every pair of wash trades, but never completed both sides of the transaction. The other two traders took turns completing the opposite side of each wash transaction. This suggests that the first trader may have recruited other Entergy-Koch Trading, LP traders to participate in these wash trades in an effort to avoid detection. Finally, it is interesting to note that every wash trade pair occurred within 5

seconds of each other, while two pairs actually occurred simultaneously. The coordinated nature of the transactions leaves no doubt as to the prearranged nature of these wash trades.

Table VII-7. Days in Which Individual Counterparties Conducted the Most Wash Trades During Choice Markets

Gas Trades			
Counterparty	**Wash Trade Pairs**	**Date**	**Product**
Entergy-Koch Trading, LP	12	26-Mar-01	US Gas Phy HeHub 28Mar01
Entergy-Koch Trading, LP	7	24-Aug-01	US Gas Phy HeHub 25-27Aug01
ENA - IM West	4	30-Aug-00	US Gas Phy Index IF EP Perm Nov00-Mar01
Reliant Energy Services, Inc.	4	7-Dec-00	US Gas Phy EPNG SoCal Topk 08Dec00
Reliant Energy Services, Inc.	4	8-Dec-00	US Gas Phy EPNG SoCal Topk 09-11Dec00
Calpine Energy Services, L.P.	3	27-Sep-01	US Gas Swap Jan-Dec02
Coral Energy Holding, L.P.	3	5-Oct-01	US Gas Swap Nymex Nov01
Entergy-Koch Trading, LP	3	20-Jul-01	US Gas Phy HeHub 21-23Jul01
Entergy-Koch Trading, LP	3	27-Jul-01	US Gas Phy HeHub 28-30Jul01
Entergy-Koch Trading, LP	3	5-Sep-01	US Gas Phy HeHub 06Sep01

Power Trades			
Counterparty	Wash Trade Pairs	Date	Product
Aquila Energy Marketing Corporation	48	6-Oct-00	US Pwr Phy Firm Mid-C Peak Dec00
Aquila Energy Marketing Corporation	45	6-Oct-00	US Pwr Phy Firm COB N/S Peak Nov00
Dynegy UK Limited	4	14-Aug-01	US Pwr Phy Firm Mid-C Peak 15Aug01
Idaho Power Company, dba IDACORP Energy	3	28-Jul-00	US Pwr Phy Firm PALVE Peak Oct00
Idaho Power Company, dba IDACORP Energy	3	6-Nov-01	US Pwr Fin Swap ISO NE HE11-23 EPT 06Nov01

The table reports the days with the most frequent wash trading with a single counterparty and in a single product.

Table VII-8. Example of a Wash Trade Sequence for Trades Between EOL and Entergy-Koch Trading, LP

Trade Time	Wash Trade Pairs	EOL Buy or Sell
11:53:13	1	Sell
11:53:14	1	Buy
11:53:39	2	Sell
11:53:39	2	Buy
11:54:33	3	Sell
11:54:33	3	Buy
11:55:11	4	Sell
11:55:13	4	Buy
11:55:27	5	Buy
11:55:28	5	Sell

Trade Time	Wash Trade Pairs	EOL Buy or Sell
11:55:38	6	Sell
11:55:41	6	Buy
11:55:53	7	Sell
11:55:57	7	Buy
11:56:17	8	Sell
11:56:18	8	Buy
11:56:32	9	Buy
11:56:37	9	Sell
11:57:00	10	Buy
11:57:02	10	Sell
11:57:17	11	Sell
11:57:20	11	Buy
11:57:38	12	Buy
11:57:39	12	Sell

The table reports a series of trades occurring on EOL on March 26, 2001. Each trade is for physical delivery of gas at Henry Hub on March 28, 2001, and each was completed at a price of $5.235.

The heaviest wash trading in power products, and the most blatant overall wash trading event, occurred on October 6, 2000, when a trader for Aquila Energy Marketing Corporation (Aquila) completed 48 wash trades for December 2000 power delivery at Mid-Columbia and 45 wash trades for November 2000 power delivery at the California-Oregon Border. As mentioned in our Initial Report, an Enron trader attributed this trading activity to the fact that Aquila's trader was participating in a promotional campaign run by Enron. In an effort to promote the use of its EOL

platform, Enron offered a prize to the trader with the highest volume of trades. In response to this campaign, the Aquila trader attempted to benefit personally by recording the largest volume of trades. An Enron trader verified that choice markets were created at both locations, which enabled Aquila's trader to complete these trades at no cost. Through this 40-minute series of 93 wash trades, the counterparty trader won and was awarded a big-screen television as the prize. The combined volume of trades involved in this incident was approximately 1 6 million MWh at a total value of $180 million, but at a net cost of $0. It is not known to what extent these data may have been reported in market indices or financial statements.

The above transactions by Entergy-Koch Trading, LP and Aquila both appear to have occurred at or near prevailing market prices. However, even a few wash trades at any price other than the average index price could have a substantial, manipulative effect on prices because the index would be skewed in the direction of the wash trades. The impact would be even more profound if the trades occurred at an illiquid location or if a larger number of wash trades occurred. In addition, creating the illusion of liquidity could distort markets, increase prices, and hurt customers.

Affiliate Price Manipulation

In many contexts, the definition of a wash trade has been limited to pairs of trades occurring simultaneously and at exactly the same price.

Despite the occasional existence of choice markets, the EOL platform is normally characterized by a positive bid-ask spread, in which the ask (or offer) quote exceeds the bid quote. In this case, simultaneous buy and sell orders would be completed at slightly different prices. In order to determine the frequency of divergently priced wash trades, Staff analyzed data based on the criteria that both legs of the wash trade involved the same product, the same volume, and the same counterparty and occurred within 2 minutes of each other; however, Staff did not require prices to be identical or to occur during a choice market. Staff's analysis identified numerous apparent wash trades at divergent prices between Enron and other nonaffiliated companies, but we were most concerned with trades that occurred between Enron and its affiliates. In fact, as the owner of EOL, Enron had the ability to act as both buyer and seller on a given transaction and use a series of buys and sells with a net cost of zero to manipulate the market. As part of our analysis, Staff identified suspicious trading activity for off-peak delivery of power at Palo Verde for the month of January 2002 (see Table VII-9).

All trades in this sequence involved EPMI Long Term Southwest (an Enron affiliate) trading on EOL and occurred on August 14, 2001, over a 5-minute period. At 16:59:49 EPMI sold on EOL at a price of $18. Four seconds later EPMI purchased on EOL at a price of $40. At 17:02:22 EPMI sold on EOL at a price of $15, before purchasing 3 seconds later at a price of $25. Thirty-three seconds later EPMI sold on EOL at $25, and 13 seconds after

that EPMI purchased on EOL at $15. At 17:03:46 EPMI sold at $40, and at 17:04:30 the sequence was completed with EPMI purchasing on EOL at $18. Note that the entire sequence of trades examined here is zero-sum. Therefore, collectively, these trades "washed.' The average price of the sequence was $24.50.

Possible reasons for entering into these trades would be to give the impression of volatility or to affect average prices reported through market indices. In either event, affiliate trades completed at prices different from the true market would involve no net gain or loss to Enron as a whole. Under no circumstances can we comprehend any legitimate business reason to enter into such a string of transactions. The fact that these trades have a zero-sum gain to both parties also demonstrates how the price (or volume) of a transaction could be varied to make a wash trading effort less obvious, which may have been the case in this instance. Based on our analysis, we conclude that this activity was for no other reason than as a self-serving experiment to create volatility and manipulate industry data.

Table VII-9. Affiliate Trading Between EOL and Enron Affiliate EPMI Long Term Southwest

Time	Wash Trade Pairs	EOL Buy	EOL Sell
16:59:49	1	$18	
16:59:53	1		$40
17:02:22	2	$15	

Time	Wash Trade Pairs	EOL Buy	EOL Sell
17:02:25	2		$25
17:02:58	3	$25	
17:03:11	3		$15
17:03:46	4	$40	
17:04:30	4		$18
Average Price		$24.50	$24.50

The table reports August 14, 2001 power trades for off-peak physical delivery of power at Palo Verde during January 2002.

One-to-Many Versus Many-to-Many Trading Platforms

The design of EOL alone greatly lends itself to trading abuses and gave Enron unprecedented influence over energy markets. Using choice markets, wash trading, and other strategies, EOL's one-to-many trading platform (in which EOL was the counterparty on every trade) enabled Enron to send false signals, including volume and pricing, to the marketplace. Because the platform was operated entirely under Enron's discretion, Enron was able to present or influence the market in any way it wished. Specifically, Enron used its wash trading activities to deceive EOL users by giving the impression of a much deeper and more developed market, thus increasing the industry's faith in EOL. Overall, these false signals increased Enron's ability to unilaterally manipulate industry data and price indices under EOL's guise as a legitimate exchange measuring real market activity.

On the other hand, exchanges designed using a many-to-many platform better reflect legitimate bargaining between a willing buyer and seller and have the transparency necessary to instill confidence in the market. Staff believes the industry has already recognized the inherent advantages of many-to-many platforms over one-to-many platforms, resulting in the IntercontinentalExchange (ICE) becoming an industry leader. However, even these platforms are not immune to manipulation. In Chapter IX, Staff identifies circumstances on many-to-many platforms in which companies use the creditworthiness of counterparties to restrict trading activity to a single counterparty only. This enables two counterparties to complete prearranged wash trades over a many-to-many platform because only the counterparty they designate as having a sufficient level of credit would have the ability to qualify as an acceptable counterparty and complete the trade at the specific bid or offer price.

Summary and Conclusions Regarding Wash Trades on EnronOnline

The Trade Press has reported that, like a casino, Enron had the "house" advantage by trading on EOL in energy markets. Based on our analysis of the archived EOL database, Staff concludes that this is a flawed analogy. For example, a card game in a casino has set rules and all players can clearly see who they are competing against. On EOL, Enron had access to trading histories, limit orders, and volumes of trades, and therefore understood

the liquidity of the market. In contrast, an unaffiliated trader on EOL was only able to see the activity that was posted electronically on the EOL screen. More significantly, when bid and ask prices were changed, the trader was unable to know if it was due to a legitimate trade or if prices were being manipulated. Unlike a casino game, this lack of transparency prevented the trader from knowing with whom he was competing. Moreover, because the EOL platform was wholly controlled by Enron, there were no fixed rules. The EOL operator had an infinite ability to manipulate what was posted in any of the ways described above. Simply put, the use of EOL enabled Enron to post any price it wanted.

Staff concludes that wash trading was commonplace on the EOL trading platform between January 2000 and November 2001, and was more prevalent in the later months of this period. The wash trades considered here were identified by statistical criteria. Although it is unlikely that every pair of trades identified here meets the criteria of being prearranged and involving no economic risk, the overall evidence (including the use of choice markets, the volume of actual and apparent wash trades, and the existence of affiliate wash trades) supports the conclusion that trading abuses and market manipulation occurred on EOL.

The Enron market maker may have taken positions that favored higher or lower prices. As such, we do not know whether the wash trades pushed gas or electric prices higher or lower.

Recommendations

Staff recommends that future trading platforms be designed to provide a sufficient level of transparency to enable users to understand the movements of the market. This transparency includes the disclosure of specific bids and offers and associated volumes for each product. Staff discourages any exchanges or trading platforms from being managed by any market participant, or combination thereof, in order to avoid the inevitable conflict of interest between the roles of brokers and traders. Finally, Staff recommends that the Commission establish specific rules banning any form of prearranged wash trading activities and prohibiting the reporting of any affiliate trading activities through industry indices. Strict adherence to these rules should be a condition of market-based rate or gas certificate authority.

Staff also recommends that the Commission condition blanket gas certificates, as well as electric power market-based rates, to require that sellers who use trading platforms use only those trading platforms that employ a "credit change monitor" that would be used to help evaluate unusual patterns in credit changes in the platform. The reason for this requirement is that the credit structure could be used to manipulate access to other traders and, therefore, the perceived market pricing. In addition, the Commission should disallow market-based rates for public utilities that use trading platforms unless the owners or operators of those platforms agree to provide the

Commission Staff with full access to trade reporting and order book information for the trading systems.

Given the relative ease with which EOL manipulated the market and deceived its users, we do not believe a one-to-many trading platform is acceptable. We recognize that electronic trading on the EOL platform offered many advantages over historical voice trading. Even with its disadvantages, traders embraced EOL because it was faster, more convenient, and gave a widely accepted point of reference. A combination of our analysis and the further evolution of many-to-many platforms and their inherent advantages over EOL should render the one-to-many platform obsolete. Finally, we note that UBS Warburg, which now operates the EOL platform, suspended its use on December 10, 2002, due to a lack of trade volume. In any event, Staff recommends that market-based rates and gas certificate authority be conditioned on sellers not using their own one-to-many platform.

Further, Staff recommends that Congress consider giving direct authority to a Federal agency to ensure that electronic trading platforms for wholesale sales of electric energy and natural gas in interstate commerce are monitored and provide market information that is necessary for price discovery in competitive energy markets.

UNITED STATES COURT
DISTICT OF NEVADA

MDL Docket No. 1566

Base Case File No. CV-S-03-1431

In re:
WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIATION

THIS DOCUMENT RELATES TO:

Case No.: CV-S-07-1019-PMP (PAL)

(*Western District of Wisconsin*
Case No. 07-C-0076-C)

ARANDELL CORPORATION, MERRICK'S INC., SARGENTO FOODS INC., LADISH CO. INC., CARTHAGE COLLEGE, BRIGGS & STRATTON CORPORATION

Plaintiffs,

vs.

XCEL ENERGY INC., NORTHERN STATES POWER COMPANY, AEP ENERGY SERVICES, INC., AMERICAN ELECTRIC POWER COMPANY, INC., CANTERA GAS COMPANY, LLC

(f/k/a CMS Field Services, Inc.), CENTERPOINT ENERGY SERVICES, INC. (f/k/a Reliant Energy Retail, Inc.), CMS ENERGY CORPORATION (a/k/a CMS Energy), CMS ENERGY RESOURCE MANAGEMENT COMPANY (f/k/a CMS Marketing Services & Trading Company), CORAL ENERGY RESOURCES, L.P., DUKE ENERGY CAROLINAS, LLC (f/k/a Duke Energy Corporation), DUKE ENERGY TRADING AND MARKETING, L.L.C., DYNEGY ILLINOIS INC. (f/k/a Dynegy, Inc.), DMT G.P. L.L.C. (successor to DMT Holdings, L.P.), DYNEGY GP INC., DYNEGY MARKETING AND TRADE, E PRIME, INC., EL PASO CORPORATION, EL PASO MARKETING, L.P., (f/k/a El Paso Merchant Energy, L.P.), ONEOK ENERGY SERVICES COMPANY, L.P., (f/k/a Oneok Energy Marketing And Trading Company, L.P.), ONEOK, INC., RELIANT ENERGY, INC., (f/k/a Reliant Resources, Inc.), RELIANT ENERGY SERVICES, INC., THE WILLIAMS COMPANIES, INC., WILLIAMS POWER COMPANY, INC. (f/k/a Williams Energy Marketing & Trading), and WILLIAMS MERCHANT SERVICES COMPANY, INC.

Defendants.

THIRD AMENDED COMPLAINT

The plaintiffs Arandell Corporation, Merrick's, Inc., Sargento Foods Inc., Ladish Co., Inc., Carthage College, and Briggs & Stratton Corporation on behalf of themselves and all others similarly situated, by their attorneys, for their second amended complaint, allege as follows:

1. This is a class action pursuant to the Wisconsin Antitrust Act (Wis. Stat. ch. 133), brought by and on behalf of a class consisting of all industrial and commercial purchasers of natural gas for their own use or consumption between January 1, 2000 and October 31, 2002 (the "Relevant Time Period"), and which gas was used or consumed by them in Wisconsin. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) entities that purchased natural gas from entities that sold natural gas at rates approved by the Wisconsin Public Service Commission (to the extent of such purchases at such approved rates); (d) defendants and their predecessors, affiliates and subsidiaries; and (e) the federal government and its agencies.

NATURAL GAS AND WISCONSIN COMMERCE

2. Each year, Wisconsin consumes over 350,000,000 thousand cubic feet (Mcf) of natural gas. That translates (depending on the price) to an expense to the Wisconsin economy of between 1.75 and 3.5 billion dollars per year, in a state that has a total gross domestic product (total value of goods and services produced in the state) of only 215 billion dollars per year. During the Relevant Time Period, Wisconsin consumed over one billion Mcf of natural gas.

3. Natural gas plays a primary role in the Wisconsin economy, as it is used as a heating fuel for many buildings, generates a substantial percentage

of the electricity consumed, and is the primary energy source for many industries (including such major Wisconsin industries as the metal working, food processing, brewing and dairy processing industries). As President Bush said in speech given in Appleton, Wisconsin in 2004, "[n]atural gas is absolutely vital for many manufacturers in Wisconsin."

4. Wisconsin produces no natural gas. All natural gas consumed in Wisconsin is produced elsewhere. Additionally, most companies that trade in natural gas, including trading natural gas that is consumed in Wisconsin, do not have their principal places of business or trading desks located in Wisconsin. Because of this, a conspiracy relating to natural gas prices has a greater impact on Wisconsin commerce than such a conspiracy would have on commerce in many other states. A conspiracy to manipulate natural gas prices, while economically benefiting the economies of some other states—such as Texas, Oklahoma and other states where producers and traders of natural gas tend to concentrate—has only negative consequences in Wisconsin.

5. The price manipulation conspiracy engaged in by the defendants during the Relevant Time Period had a profoundly negative impact on commercial entities in Wisconsin. For example, according to the Energy Information Agency, the city gate price for natural gas in Wisconsin increased from a price of $2.94 Mcf in January 2000, to a price of $9.92 Mcf in January 2001. The average monthly price for natural gas commercial consumers in Wisconsin

* * *

OVERVIEW OF PLAINTIFFS' CAUSES OF ACTION

6. The plaintiffs allege in this case two causes of action, the first under Wis. Stat. § 133.14 (Wisconsin's "Full Consideration Antitrust Statute") and the second under Wis. Stat. § 133.18 (Wisconsin's "Treble Damages Antitrust Statute").

7. Under the first cause of action, the plaintiffs seek a declaratory judgment that certain natural gas contracts and agreements made during the Relevant Time Period are void pursuant to Wis. Stat. § 133.14. The grounds for such a ruling are that during the Relevant Time Period the defendants were members of a conspiracy prohibited by Wis. Stat. § 133.03. Specifically, the defendants are sellers of natural gas, and during the Relevant Time Period each of them conspired to restrain trade or commerce relating to natural gas. As such, the contracts or agreements that relate to Wisconsin for the sale of natural gas that were made by the defendants while in the conspiracy—which contracts or agreements were founded upon, were the result of, grew out of or were connected with the conspiracy, either directly or indirectly—are void pursuant to Wis. Stat. § 133.14. The plaintiffs request that the Court formally declare those contracts or agreements void pursuant to Wis. Stat. 806.04, Wisconsin's Uniform Declaratory Judgment Act.

8. Wis. Stat. § 133.14 further provides that because the defendants were members of a conspiracy prohibited by Wis. Stat. § 133.03, none of

them may recover on, or benefit from, any such void contract. Furthermore, under the second sentence of Wis. Stat. § 133.14, the plaintiffs are entitled to recover from the defendants the payments they made for natural gas during the Relevant Time Period, to the full extent that the defendants benefited from those payments. Wis. Stat. § 133.03 and § 133.14 are remedial, punitive statutes, which were created by the Wisconsin legislature to deter companies from engaging in price collusion, so as to protect the free market system. The legislature wanted to deter price collusion so that the benefits of free market lower prices—which benefits can and should flow to the public—are not denied by unlawful collusion. Because the defendants violated Wis. Stat. § 133.03 and because those agreements are void under Wis. Stat. § 133.14, plaintiffs are entitled to recover from the defendants in this action the full amount of the payments the plaintiffs made for natural gas during the Relevant Time Period.

9. Under the second separate and independent cause of action, the plaintiffs allege that the defendants violated Wis. Stat. § 133.03. Specifically, the defendants are sellers of natural gas, and during the Relevant Time Period, the defendants violated Wis. Stat. § 133.03 by conspiring to restrain trade or commerce relating to natural gas. The plaintiffs were directly or indirectly injured by such conduct. As such, the plaintiffs are entitled pursuant to Wis. Stat. § 133.18 to recover three times the damages sustained by them from the defendants, reduced after trebling by any payments actually recovered by the plaintiffs under the plaintiffs' claim under Wis. Stat. § 133.14.

10. Although the federal government, through the Federal Energy Regulatory Commission, regulates a small portion of sales of natural gas in the United States, the plaintiffs herein do not seek to recover damages for any sales the price of which is set via a regulatory procedure by the Federal Energy Regulatory Commission. The natural gas transactions that are the subject of this case were deregulated pursuant to various statutory provisions *(see,* The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301(21) (1994) (first sales are defined in § 2(21)); Section 601(a)(1)(C) of the NGPA, as amended by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60) (no FERC jurisdiction over first sales); The Energy Policy Act of 1992, 15 U.S. Code § 3431 and pursuant to Federal Energy Regulatory Commission Order No. 547, 61 FERC 61281 (November 30, 1992), Order No. 636, 57 FERC 30939 (April 8, 1992, and Order No. 636-A, 57 FERC 36128 (August 12, 1992)).

PLAINTIFFS

11. Plaintiff Arandell Corporation is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Menomonee Falls, Wisconsin. Arandell Corporation is a leading printer of catalogs for retailers. Through its purchasing agent Kaztex Energy Management, Arandell Corporation purchased natural gas directly from a number of defendants in this case during the Relevant Time Period, including but not necessarily limited to Coral Energy Resources, LP, Duke Energy Trading and Marketing, LLC, Dynegy Marketing & Trade, El Paso Merchant Energy, LP (n/k/a El Paso

Marketing, L.P.), and Oneok Energy Marketing and Trading Company, LP. Through Kaztex, Arandell Corporation also purchased from other companies affiliated with defendants in this case, including but not limited to Coral Energy Holding, LP and Oneok Gas Marketing Company.

12. Plaintiff Merrick's, Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Middleton, Wisconsin. Merrick's, Inc. is a leading manufacturer and processor of baby animal feed products.

13. Plaintiff Sargento Foods Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Plymouth, Wisconsin. Sargento Foods Inc. is a leading processor and distributor of cheese.

14. Plaintiff Ladish Co., Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Cudahy, Wisconsin. Ladish designs and manufactures high-strength forged and cast metal components for aerospace and industrial markets. It is one of the largest users of natural gas in the state of Wisconsin, each year purchasing several million dollars worth of natural gas for its operations. During the Relevant Time Period, Ladish purchased natural gas from defendant CenterPoint Energy Services, Inc., formerly known as Reliant Energy Retail, Inc.

15. Plaintiff Carthage College is a private educational institution with its campus in Kenosha,

Wisconsin. Carthage College is a college of the liberal arts and sciences with a current enrollment of roughly 2,250 full-time students, and is affiliated with the Evangelical Lutheran Church in America. Through its purchasing agent Kaztex Energy Management, Carthage College purchased natural gas directly from a number of defendants in this case during the Relevant Time Period, including but not necessarily limited to Coral Energy Resources, LP, Duke Energy Trading and Marketing, LLC, Dynegy Marketing & Trade, El Paso Merchant Energy, LP (n/k/a El Paso Marketing, L.P.), and Oneok Energy Marketing and Trading Company, LP. Through Kaztex, Carthage College also purchased from other companies affiliated with defendants in this case, including but not limited to Coral Energy Holding, LP and Oneok Gas Marketing Company.

16. Plaintiff Briggs & Stratton Corporation is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Milwaukee, Wisconsin. Briggs & Stratton Corporation is the world's largest producer of air-cooled gasoline engines for outdoor power equipment. During the Relevant Time Period, Briggs & Stratton Corporation's natural gas purchases totaled over $11 6 million, making it one of the largest industrial users of natural gas in Wisconsin during the Relevant Time Period. Through its purchasing agent Kaztex Energy Management, Briggs & Stratton Corporation purchased natural gas directly from a number of defendants in this case during the Relevant Time Period, including but not necessarily limited to Coral Energy Resources, LP, Duke Energy Trading and

Marketing, LLC, Dynegy Marketing & Trade, El Paso Merchant Energy, LP (n/k/a El Paso Marketing, L.P.), and Oneok Energy Marketing and Trading Company, LP. Through Kaztex, Briggs & Stratton Corporation also purchased from other companies affiliated with defendants in this case, including but not limited to Coral Energy Holding, LP and Oneok Gas Marketing Company.

DEFENDANTS

A. The ONEOK Defendants: ONEOK Inc. and ONEOK Energy Marketing and Trading Company, L.P.

17. Defendant ONEOK Inc. is a Delaware corporation which has its principal place of business in Tulsa, Oklahoma. ONEOK Inc. wholly owns defendant ONEOK Energy Marketing and Trading Company, L.P., and other affiliates or divisions that regularly sold natural gas consumed in Wisconsin, and to Wisconsin businesses. On information and belief, grounds exist for disregarding the corporate fiction between ONEOK Inc. and its subsidiary ONEOK Energy Marketing and Trading Company, L.P. based on such cases as *Weibke v. Richardson & Sons, Inc.*, 83 Wis. 2d 359, 363, 265 N.W.2d 571 (1978); *Consumer's Co-op. of Walworth County v. Olsen*, 142 Wis. 2d 465, 476, 419 N.W.2d 211 (1988); *Cemetery Services, Inc. v. Wisconsin Dept. of Regulation and Licensing*, 221 Wis. 2d 817, 827, 586 N.W.2d 191 (Ct. App. 1998); and *Conservatorship of Prom v. Sumitomo Rubber Industries, Ltd.*, 224 Wis. 2d 743, 760-61, 592 N.W.2d 657 (Ct. App. 1999). ONEOK Inc. buys, sells, transports, and stores

natural gas, including its own and its affiliates' production, in the United States and in Wisconsin.

18. Defendant ONEOK Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. ONEOK Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period ONEOK either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officers or directors, including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officers or directors, including "Senior Management Team" member

Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as ONEOK Energy Marketing and Trading Company, L.P., in the United States and in Wisconsin.

19. Personal jurisdiction exists over ONEOK Inc. based upon the activities of its corporate affiliates, in particular ONEOK Energy Marketing and Trading Company, L.P., that traded and sold natural gas in the United States and to Wisconsin-based companies during the Relevant Time Period. ONEOK, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials. In October, 2002, ONEOK, Inc. and ONEOK Energy Marketing and Trading, L.P., paid $3 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting of natural gas prices during the time period from at least July 2000 to October 2002.

20. Defendant ONEOK Energy Marketing and Trading Company, L.P., is a Delaware limited partnership in good standing and has its principal place of business in Tulsa, Oklahoma. ONEOK Energy Marketing and Trading Company, L.P., is wholly owned and controlled by defendant ONEOK,

Inc. concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy, one or more officers or directors of ONEOK, Inc., including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which ONEOK Energy Marketing and Trading Company, L.P. sold in Wisconsin and elsewhere. ONEOK Energy Marketing and Trading Company, LP., buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

B. The Williams Defendants: The Williams Companies, Inc., Williams Power Company, Inc. (f/n/a Williams Energy Marketing & Trading) and Williams Merchant Services Company, Inc.

21. Defendant The Williams Companies, Inc. is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. The Williams Companies, Inc. wholly owns and controls Williams Power Company, Inc., Williams Merchant Services Company, Inc. and other affiliates or divisions that regularly sold natural gas consumed

in Wisconsin, and to Wisconsin businesses. On information and belief, grounds exist for disregarding the corporate fiction between The Williams Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* The Williams Companies, Inc. through its affiliates, buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

22. Defendant The Williams Companies, Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. On information and belief, during the Relevant Time Period The Williams Companies, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. The Williams Companies, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officers or directors, such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of

natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officers or directors, such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Williams Power Company, Inc. and Williams Merchant Services Company, Inc. in the United States and in Wisconsin.

23. Personal jurisdiction exists over The Williams Companies, Inc. based upon the activities of its corporate affiliates, in particular Williams Merchant Services Company, Inc. and Williams Power Company, Inc., that traded and sold natural gas in the United States and to Wisconsin companies during the Relevant Time Period. The Williams Companies, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials. William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., is "Senior Officer" of The Williams Companies, Inc. The Williams Companies, Inc. and Williams Power Company, Inc. Company paid $20 million in civil penalties in July, 2003 to the

United States Commodity Futures Trading Commission to settle charges of attempting to manipulate natural gas price indices. On December 17, 2004, a former trader of Williams Energy Marketing & Trading Company, Thomas J. Pool, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms from mid-1998 through mid-2002 for the purpose of manipulating monthly price indices of natural gas. As part of his plea agreement he admitted that he had the ability to influence the market price of natural gas in interstate commerce, that the published index price of natural gas was artificial in that it did not reflect the legitimate forces of supply and demand, that his conduct was the cause of the artificial price, and that he intended to cause the artificial price. Mr. Pool admitted that most of the trades he reported while an employee of Williams were deliberately fabricated. Mr. Pool admitted creating fictitious natural gas trades at the behest of his supervisor.

24. On May 20, 2005, another former trader of Williams Energy Marketing & Trading Company, Brion Scott McKenna, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms, *Inside FERC's Gas Market Report* and *NGI's Bidweek Survey*, from September, 2000 to June 30, 2002 for the purpose of manipulating published index prices of natural gas in the West Coast, East Coast, Gulf Coast and Rocky Mountain regions of the United States. Mr. McKenna admitted in his Plea Agreement to successfully manipulating the index prices of natural gas on February 1, 2001 at the following locations:

Columbia Gas Transmission Corp. at Appalachia; Florida Gas Transmission Co. pipeline at Zones 2 and 3; Natural Gas Pipeline Co. of America pipeline at Louisiana; Transcontinental Gas Pipeline Corp. at Zone 2; and Transco Zone 6 Market Center. Mr. McKenna admitted in his Plea Agreement that by reporting false trades, he intended to influence the price published by *Inside FERC* and *NGI* at each location for which he reported, and to the extent that his false trade information was included in the respective index calculations, the published index prices did not reflect the legitimate forces of supply and demand. Mr. McKenna admitted that most of the trades he reported were deliberately fabricated, and that he would routinely circulate a spreadsheet containing fictitious trades for input from other traders. Mr. Thomas Pool, another Williams trader, has admitted as part of his plea agreement that he was trained and directed by his supervisors to undertake and cover-up the manipulation of natural gas prices. In February 2006, Williams Power Company, Inc. agreed to pay $50 million to the Justice Department to settle claims relating to its artificially jacking up natural gas prices in 2000 and 2001. In its agreement with the Justice Department, Williams Power Company, Inc. acknowledged responsibility for the actions of its former employees in its energy trading operation. In 2006 Williams Power Company, Inc. also agreed to pay $290 million to resolve a class action lawsuit alleging that the company improperly booked millions of dollars in profits for its energy marketing and trading division during the Relevant Time Period. In 2006 Williams Power Company, Inc.'s former trader and operations

manager Daryl Brown pleaded guilty in connection with a scheme to manipulate prices. Brown pleaded guilty to one count of manipulation of the price of a commodity in interstate commerce in violation of the Commodity Exchange Act, admitting that throughout the Relevant Time Period he conspired to report false trades to Platts' *Inside FERC's Gas Market Report* and to NGI's *Bidweek Survey* in order to affect published indexes.

25. Defendant Williams Merchant Services Company, Inc., is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. is wholly owned and controlled by its parent company, The Williams Companies, Inc. a Delaware corporation with headquarters in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. wholly owns and controls Williams Power Company, Inc. Williams Merchant Services Company, Inc. is wholly owned and controlled by The Williams Companies, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of The Williams Companies, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to

reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Merchant Services Company, Inc. or its affiliate Williams Power Company, Inc. sold in Wisconsin and elsewhere. Williams Merchant Services Company, Inc. buys, sells, stores and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

26. Defendant Williams Power Company, Inc. (f/k/a Williams Energy Marketing & Trading) is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Defendant Williams Power Company, Inc. is wholly owned and controlled by Williams Merchant Services Company, Inc., which in turn is wholly owned and controlled by its parent, defendant The Williams Companies, Inc. Defendant Williams Power Company, Inc. is wholly owned and controlled by defendants, Williams Merchant Services Company, Inc. and The Williams Companies, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officers and directors of The Williams Companies, Inc. and Williams Merchant Services Company, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural

gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Power Company, Inc. sold in Wisconsin and elsewhere. Defendant Williams Power Company, Inc. buys, sells, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

C. The AEP Defendants: American Electric Power Company and AEP Energy Services, Inc.

27. Defendant American Electric Power Company is a New York corporation in good standing and has its principal place of business in Columbus, Ohio. The American Electric Power Company wholly owned and controlled during the Relevant Time Period its subsidiary AEP Energy Services, Inc., an Ohio corporation with its principal place of business in Columbus, Ohio. On information and belief, grounds exist for disregarding the corporate fiction between The AEP Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* Defendant American Electric Power Company buys, sells and transports electricity and natural gas, including its own and its affiliates' production, in the United States and in Wisconsin.

28. Defendant American Electric Power Company, directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices

of natural gas. On information and belief, during the Relevant Time Period American Electric Power Company, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. American Electric Power Company's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officers or directors agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officers or directors, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as AEP Energy Services, Inc. According to a FERC Report, American Electric Power Company and AEP Energy Services, Inc. traders were instructed by their superiors to adjust

the prices and volumes of trades they had made and, in some cases, to report trades that never occurred, because it was common practice in the industry.

29. Personal jurisdiction exists over American Electric Power Company based upon the activities of its corporate affiliates, in particular AEP Energy Services, Inc., that sold natural gas in the United States and in Wisconsin during the Relevant Time Period. AEP Energy Services, Inc. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. American Electric Power Company, and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials.

30. Defendant AEP Energy Services, Inc. is an Ohio corporation in good standing and has its principal place of business in Columbus, Ohio. AEP Energy Services, Inc. is wholly owned and controlled by its parent, American Electric Power Company, an Ohio corporation with headquarters in Columbus, Ohio. AEP Energy Services, Inc. is wholly owned and controlled by defendant American Electric Power Company concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, one or more officers or

directors of American Electric Power Company, Inc. made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which AEP Energy Services, Inc. sold. AEP Energy Services, Inc. bought, sold and transported natural gas during the Relevant Time Period, including its own or its affiliates' production, in the United States and in Wisconsin. In September 2005 the CFTC filed a civil action against Joseph Foley, a former trader employed by American Electric Power Company and AEP Energy Services, Inc. The complaint alleges that from November 2000 through September 2002, Foley engaged in a pervasive and widespread scheme involving his directing those he supervised to deliver to market index publishers false reports concerning natural gas trades. As part of Foley's scheme, at one of the trading desks owned by either American Electrical Power Company or its affiliate AEP Energy Services, Inc., the traders maintained electronic spreadsheets entitled "IFERC Bogus" and "Joe Mama" to record false trades. American Electrical Power Company or AEP Energy Services, Inc. rewarded Foley for the funds he brought into the companies based on his reporting false trades, awarding him over $2 million in bonus compensation in 2002. In January 2005, American Electric Power Company and AEP Energy Services, Inc. paid $30 million in civil penalties to the CFTC to settle charges of false reporting and attempted manipulation of natural gas prices. AEP Energy Services, Inc. also paid $30 million in civil penalties

to the United States Department of Justice while acknowledging and accepting responsibility for submitting knowingly inaccurate trade information for its Gulf Natural Gas Trading Desk, and for two other trading desks covering the Northeast and Mid-Continent regions.

31. Personal jurisdiction exists over AEP Energy Services, Inc. based upon its sales of natural gas in the United States and in Wisconsin during the Relevant Time Period. AEP Energy Services, Inc. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.

32. Defendant American Electric Power Company, Inc. is liable for the debts and obligations of its wholly owned subsidiary AEP Energy Services, Inc. Throughout the Relevant Time Period, American Electric Power Company, Inc. was aware of the illegal behavior being engaged in by its subsidiary, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding hundreds of millions of dollars in profits from its subsidiary to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on October 10, 2002, American Electric Power Company, Inc.'s Chairman, President and CEO E. Linn Draper announced "a significant down sizing of our trading and marketing operations" *(i.e.*, AEP Energy Services, Inc.). On information and belief, the way in which the subsidiary was created and

capitalized, and the parent company's moves discontinuing operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when American Electric Power Company, Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

D. The Duke Defendants: Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) and Duke Energy Trading and Marketing Company, L.L.C.

33. Defendant Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) is a North Carolina corporation with its principal place of business in Charlotte, North Carolina. During all relevant times Duke Energy Corporation wholly owned and controlled its subsidiary, Duke Energy Trading and Marketing Company, L.L.C., a Delaware limited liability corporation with its principal place of business in Houston, Texas. On information and belief, grounds exist for disregarding the corporate fiction between the Duke Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* Duke Energy Corporation wholly owned and controlled Duke Energy Trading and Marketing Company, L.L.C., and other affiliates that regularly sold natural gas consumed in Wisconsin, and to Wisconsin businesses.

34. Defendant Duke Energy Corporation directly and through affiliates it dominated and controlled, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between

the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Duke Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Duke Energy Corporation, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officers or directors agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officers or directors made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Duke Energy Trading and

Marketing Company, L.L.C., in the United States and in Wisconsin.

35. Personal jurisdiction exists over Duke Energy Carolinas, LLC, Corporation based upon the activities of its corporate affiliates, in particular Duke Energy Trading and Marketing, L.L.C., that traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. Duke Energy Corporation and/or its affiliate Duke Energy Trading and Marketing, L.L.C., entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. Duke Energy Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin, through their marketing efforts and materials. In September, 2003, Duke Energy Corporation and Duke Energy Trading and Marketing, L.L.C. paid $28 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

36. Defendant Duke Energy Trading and Marketing Company, L.L.C. is a Delaware limited liability corporation registered as a foreign corporation in Wisconsin, with its principal place of business in Houston, Texas. Duke Energy Trading and Marketing Company, L.L.C. is wholly owned and controlled by its parent, Duke Energy Corporation, a Delaware corporation with its principal place of business in Charlotte, North

Carolina. Duke Energy Trading and Marketing Company, L.L.C. marketed natural gas to customers across North America. Duke Energy Trading and Marketing Company, L.L.C. is wholly owned and controlled by defendant Duke Energy Corporation concerning both the conduct of its business relating to the Wisconsin market and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of Duke Energy Corporation made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Duke Energy Trading and Marketing Company, L.L.C. sold in Wisconsin and elsewhere. In February 2005, the Commodity Futures Trading Commission filed a civil action in the United States District Court for the Southern District of Texas, against Michael Whitney, a former energy trader of Duke Energy Trading and Marketing Company, alleging that Whitney submitted or caused to be submitted false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, concerning natural gas transactions which he executed between June, 2001 and August, 2002. Duke Energy Trading and Marketing Company, L.L.C. buys, sells, stores, and transports

natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

37. In February 2005, pursuant to a grand jury investigation the United States indicted former Duke executives Timothy Kramer and Todd Reid on 20 counts of conspiracy, circumvention of controls and falsification of books, wire fraud, violation of honest services act, and mail fraud relating to natural gas trades occurring during the Relevant Time Period. Timothy Kramer was Vice President of Financial Portfolio Management for Duke Energy and an officer of Duke Energy Trading and Marketing Company, L.L.C., and several other Duke Energy subsidiaries. Todd Reid was Senior Vice President of Duke Energy Trading and Marketing Company, L.L.C., and also an officer of several other subsidiaries of Duke Energy. During the Relevant Time Period, Kramer and Reid engaged in what was known as a "round trip trades" or "sleeve trades," which are pre-arranged transactions involving natural gas contracts whereby there is a simultaneous purchase and sale of natural gas between the same parties, for the same volume and term, at the same price, with no contemplation of the payment of money by either party. For the year 2001, a year in which Kramer and Reid made numerous round trip and sleeve trades, Duke Energy paid bonuses (in cash and in Duke Energy stock) of $5,000,000 to Reid and $4,000,000 to Kramer. The indictment indicates that from March 2001 to August 2002, Kramer and Reid knowingly did combine, conspire and agree with each other and other unknown persons to commit wire fraud, and that as part of their conspiracy between themselves

and other unknown persons they caused the execution of over 500 false round trip natural gas trades. The precise identity of the unknown persons who conspired and agreed with Kramer and Reid is unknown to the plaintiffs, but on information and belief, they are the defendants and the non-defendant co-conspirators named below. In large part based on Kramer and Reid's actions, Duke Energy's earnings for the last three quarters of 2001 and first quarter of 2002 overstated earnings by approximately $54 million.

38. Defendant Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) is liable for the debts and obligations of its wholly owned subsidiary Duke Energy Trading and Marketing Company, L.L.C. AEP Energy Services, Inc. Throughout the Relevant Time Period, Duke Energy Corporation was aware of the illegal behavior being engaged in by its subsidiary, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding hundreds of millions of dollars in profits from its subsidiary to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on April 11, 2003, Duke Energy Corporation's President and CEO Fred Fowler announced the closing of all Duke proprietary trading groups. On information and belief, the way in which the subsidiary was created and capitalized, and the parent company's moves discontinuing operations, and relating to discontinuing operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when Duke Energy Corporation first became aware of, or should have

become aware of, the illegal behavior engaged in by its subsidiary.

E. The Dynegy Defendants: Dynegy Illinois Inc. (f/k/a Dynegy Inc.), Dynegy GP Inc., DMT G.P. L.L.C. (successor to DMT Holdings, L.P.), and Dynegy Marketing & Trade.

39. Defendant Dynegy Illinois Inc. (f/k/a Dynegy Inc.) is an Illinois corporation in good standing with its principle place of business in Houston, Texas. Dynegy Illinois Inc. wholly owns and controls defendant Dynegy Marketing & Trade, a Colorado general partnership in good standing with its principal place of business in Houston, Texas. Dynegy Marketing & Trade is wholly owned and controlled by its general partners, defendants Dynegy GP Inc. and DMT G.P., L.L.C. (successor to DMT Holdings, L.P.). On information and belief, grounds exist for disregarding the corporate fiction between the Dynegy Defendants based on the rules normally relating to partnerships and such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom*. Dynegy Marketing & Trade was one of the largest natural gas marketers in the United States and in 2001, Dynegy Marketing & Trade's natural gas sales averaged 8.2 billion cubic feet per day. Dynegy Marketing & Trade regularly conducted business in Wisconsin during the Relevant Time Period. Dynegy Marketing & Trade entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.

40. Defendant Dynegy Marketing & Trade made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Dynegy Marketing & Trade's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Dynegy Marketing & Trade, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officers or directors, such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officers or directors, such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, made

strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Dynegy Marketing & Trade sold in Wisconsin and elsewhere, and those policies and decisions were implemented on an operational level by Dynegy Marketing & Trade's employees.

41. On September 25, 2002, Dynegy announced that 15 of its employees had engaged in reporting false data to price compilers. Dynegy Marketing & Trade's employees have stated the manner by which they reported trades to industry publications was similar to the way in which it was done at their previous companies, and that this illegal practice was "common practice in the industry" during the Relevant time period.

42. In July 2005, acting on the results of a grand jury investigation, the United States indicted former Dynegy Marketing & Trade natural gas trader Michelle Marie Valencia and former El Paso Corporation trader Greg Singleton, alleging that they—in conspiracy with each other and with other unknown persons—made numerous false reports of natural gas trades to index publishers. The precise identity of the other unknown persons who were involved in the conspiracy are currently unknown to the plaintiffs, but on information and belief, they are the defendants and the non-defendant co-conspirators named below. The indictment of Valencia and Singleton indicates that the false information they reported to publications affected

and tended to affect index prices, and thereby the price of natural gas in countless transactions all across the United States, which potentially cost consumers of natural gas great sums of money. As part of the conspiracy alleged in the indictment, Singleton and Valencia discussed what trades they did and did not intend to report to index publications, they agreed to report at least one trade between El Paso and Dynegy that was not real, they agreed not to report one or more natural gas trades between Dynegy and El Paso that were in fact real trades, and they caused other employees of Dynegy and El Paso to report fictitious gas trades to *NGI* and *Inside FERC*. In a second superseding indictment relating to Valencia filed in March 2006, the United States alleged that when Valencia reported false information to *Inside FERC* and *Natural Gas Intelligence* in 2000 and 2001, she affected and tended to affect index prices, and thereby the price of natural gas paid by consumers. In August 2006, Valencia of Dynegy was convicted of seven counts of wire fraud relating to reporting false natural gas trades, and Singleton of El Paso was convicted of a count of wire fraud relating to reporting false natural gas trades.

43. In December, 2002, Dynegy Marketing & Trade and West Coast Power LLC, paid $5 million in civil penalties to the United States Commodity Future Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. The charges included that Dynegy Marketing & Trade and West Coast Power LLC conspired together to report false offsetting trades. By reporting offsetting trades, the companies intended

to make their false trades look more believable to the index publishers.

44. Defendant Dynegy Illinois Inc. (f/k/a Dynegy Inc.) is liable for the debts and obligations of its wholly owned and controlled subsidiaries Dynegy GP Inc., DMT G.P., L.L.C. (successor to DMT Holdings, L.P.) and Dynegy Marketing & Trade. Throughout the Relevant Time Period, Dynegy Illinois Inc. was aware of the illegal behavior being engaged in by its subsidiaries, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding millions of dollars in profits from its subsidiaries to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on October 16, 2002, Dynegy Illinois Inc.'s interim CEO Dan Dienstbier announced that Dynegy Illinois Inc. was abandoning its merchant energy operation. On information and belief, the way in which the subsidiary was created and capitalized, and the moves relating to discontinuing its operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when Dynegy Illinois Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

F. The El Paso Defendants: El Paso Corporation and El Paso Marketing, L.P. (f/k/a El Paso Merchant Energy, L.P.)

45. Defendant El Paso Corporation is a Delaware corporation in good standing with its principal place of business in Houston, Texas. El Paso consistently described itself during the Relevant Time Period as

North America's leading provider of natural gas services. El Paso Corporation wholly owns and controls its subsidiary, El Paso Marketing, L.P. (f/k/a El Paso Merchant Energy, L.P.), a Delaware limited partnership with its principal place of business in Houston, Texas. On information and belief, grounds exist for disregarding the corporate fiction between the El Paso Defendants based on the rules relating to partnerships generally and such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* El Paso Corporation buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

46. Defendant El Paso Corporation directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. El Paso Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period El Paso Corporation, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officers or directors, such as Ralph Eads, Executive

Vice President of El Paso, agreed to arrangements, contracts, agreements, and to a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officers or directors, such as Ralph Eads, Executive Vice President, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as El Paso Merchant Energy, L.P., in the United States and in Wisconsin.

47. Personal jurisdiction exists over El Paso Corporation based upon the activities of its corporate affiliates, in particular El Paso Merchant Energy, L.P., that traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. El Paso Merchant Energy, L.P. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. El Paso Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and

materials. In March, 2003, El Paso Corporation and El Paso Merchant Energy, L.P., paid $20 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. In November, 2004, three former natural gas traders of El Paso Merchant Energy, L.P., Donald E. Burwell, James P. Phillips, and Greg Singleton, were charged by the United States Department of Justice, U.S. Attorney's Office for the Southern District of Texas, based on a grand jury indictment, with conspiracy, false reporting, and wire fraud related to the transmission of allegedly inaccurate trade reports to industry price compilers which used the reported trades to calculate the index price of natural gas. El Paso trader Todd Gelger was sentenced to two years in federal prison following his conviction for reporting false information related to natural gas trades. El Paso trader Donald E. Burwell pled guilty in February 2006, to false reporting of natural gas trades. In the indictment relating to Burwell the grand jury charged that he and other traders with whom he combined, conspired and agreed reported false trading information, which affected index prices, and thereby, the price of natural gas in countless transactions around the country, and potentially cost consumers of natural gas great sums of money.

48. In July 2005, acting on a grand jury investigation, the United States indicted former El Paso Corporation trader Greg Singleton, along with former Dynegy Marketing & Trade natural gas trader Michelle Marie Valencia, alleging that during the Relevant Time Period they engaged in a

conspiracy—with each other and with other unknown persons—to make numerous false reports of natural gas trades to index publishers. The precise identity of the other unknown persons who were involved in the conspiracy are currently unknown to the plaintiffs, but on information and belief, they are the defendants and the non-defendant co-conspirators named below. Their indictment indicates that the false information they reported to publications affected and tended to affect index prices, and thereby the price of natural gas in countless transactions all across the United States, which potentially cost consumers of natural gas great sums of money. As part of the conspiracy alleged in the indictment, they discussed what trades they did and did not intend to report to index publications, they agreed to report at least one trade between El Paso and Dynegy that was not real, they agreed not to report one or more natural gas trades between Dynegy and El Paso that were in fact real trades, and they caused other employees of Dynegy and El Paso to report fictitious gas trades to NGI and Inside FERC. In August 2006, Valencia of Dynegy was convicted of seven counts of wire fraud relating to reporting false natural gas trades, and Singleton of El Paso was convicted of a count of wire fraud relating to reporting false natural gas trades. In December 2003, El Paso trader Todd Geiger, a former vice president of El Paso, pled guilty to reporting 48 fake trades in November 2003 to the publication *Inside FERC*. Geiger admitted in court that he knew the trades were false and that the index was used to price natural gas. In October 2004, four former El Paso Corporation natural gas

traders (Christopher Bakkenist, Donald Guilbault, William Ham and Dallas Dean) each pleaded guilty to making false reports used to calculate the index price of natural gas during the Relevant Time Period.

49. Defendant El Paso Merchant Energy, L.P. is a Delaware limited partnership with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly owned and controlled by its parent company, El Paso Corporation, a Delaware corporation with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly owned and controlled by defendant El Paso Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of El Paso Corporation, such as Ralph Eads, Executive Vice President of El Paso Corporation and President of El Paso's Merchant Energy Group, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which El Paso Merchant Energy, LP. sold in Wisconsin and elsewhere. El Paso Merchant Energy, L.P. buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

G. **The CMS Defendants: CMS Energy Corporation (a/k/a CMS Energy), CMS Energy Resource Management Company (f/k/a CMS Marketing Services & Trading Company), and Cantera Gas Company, LLC (f/k/a CMS Field Services, Inc.)**

50. Defendant CMS Energy Corporation is a Michigan corporation in good standing with its principal place of business in Jackson, Michigan. CMS Energy Corporation wholly owned and controlled during the Relevant Time Period its subsidiary CMS Marketing Services & Trading Company (n/k/a CMS Energy Resource Management Company), a Michigan corporation with its principal place of business in Houston, Texas. CMS Energy Corporation wholly owned and controlled during the Relevant Time Period CMS Field Services, Inc. (n/lea Cantera Gas Company, LLC), a Michigan corporation with its principal place of business in Tulsa, Oklahoma. On information and belief, grounds exist for disregarding the corporate fiction between the CMS Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* CMS Energy Corporation wholly owned and controlled CMS Marketing Services & Trading Company, CMS Field Services, Inc., and other affiliates or divisions that regularly conducted business in Wisconsin during the Relevant Time Period.

51. Defendant CMS Energy Corporation, directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between

the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. CMS Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period CMS Energy Corporation, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, CMS Energy Corporation's officers or directors, such as Victor J. Fryling, President and Chief Operating Officer, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, CMS Energy Corporation's officers or directors, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was

sold, and those policies and decisions were implemented on an operational level by affiliates, such as CMS Marketing Services & Trading Company and CMS Field Services, Inc., in the United States and in Wisconsin.

52. Personal jurisdiction exists over CMS Energy Corporation based upon the activities of its corporate affiliates, in particular CMS Marketing, Services & Trading Company and CMS Field Services, Inc., that traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. CMS Energy Corporation, either directly or through one of its affiliates, entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. CMS Energy Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials. In November, 2003, CMS Energy Corporation, CMS Marketing, Services & Trading Company, and CMS Field Services, Inc. paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

53. Defendant CMS Marketing Services & Trading Company was a Michigan corporation registered as a foreign corporation in good standing in Wisconsin during the Relevant Time Period with its principal place of business in Houston, Texas. CMS Marketing Services & Trading Company was

wholly owned and controlled during the Relevant Time Period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS Marketing Services & Trading Company was wholly owned and controlled by defendant CMS Energy Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Marketing Services & Trading Company sold. CMS Marketing Services & Trading Company bought, sold and transported natural gas, including its own or its affiliates' production, during the Relevant Time Period in the United States and in Wisconsin.

54. Defendant Cantera Gas Company, LLC (f/k/a CMS Field Services, Inc., Inc.) at all relevant times was a Michigan corporation in good standing during the Relevant Time Period with its principal place of business in Tulsa, Oklahoma. CMS Field Services, Inc. was wholly owned and controlled during the Relevant Time Period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan.

CMS Field Services, Inc. changed its name after the Relevant Time Period to CMS Continental Natural Gas, Inc., and later to Cantera Gas Company, LLC. CMS Field Services, Inc. was wholly owned and controlled by defendant CMS Energy Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Field Services, Inc. and CMS Marketing Services & Trading Company sold. On or about February 1, 2005, the Commodity Futures Trading Commission filed a civil action in United States District Court for the Northern District of Oklahoma, against Jeffrey A. Bradley (formerly the manager of marketing for CMS Field Services, Inc.), and Robert L. Martin (formerly the director of gas supply for CMS Field Services, Inc.) alleging that they conspired to submit false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, between January, 2001 and October, 2002. In one telephone conversation between Bradley and Martin, these men "openly discussed a

plan to 'make up some numbers and turn them into the reporting firms.' " Further details regarding the conspiracy are set forth in *U.S. Commodity Futures Trading Commission v. Bradley*, 408 F. Supp. 2d 1214, 1221 (N.D. Okla. 2005)(decision denying defendants' motion to dismiss, based on the defendants' characterization of facts, which the court found at least in part "disingenuous, at best"); *U.S. Commodity Futures Trading Commission v. Bradley*, 2006 WL 2045847 (N.D. Okla.)(decision denying defendant Robert Martin's motion for summary judgment). CMS Field Services, Inc. bought, sold, stored, and transported natural gas, including its own or its affiliates' production, during the Relevant Time Period in the United States and in Wisconsin.

H. The Reliant Defendants: Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), Reliant Energy Services, Inc., and CenterPoint Energy Services, Inc. (f/k/a "Reliant Energy Retail, Inc.").

55. Defendant Reliant Energy, Inc. is a Delaware corporation in good standing with it principal place of business in Houston, Texas. Defendant Reliant Energy, Inc. changed its name from Reliant Resources, Inc. in April, 2004. Reliant Resources Inc. was created as a subsidiary of Reliant Energy Incorporated sometime after 1999 in order to comply with the passage of the Texas Electric Choice Act, which required Reliant Energy Incorporated to split its regulated and unregulated businesses. The end result of that effort was that Reliant Energy Incorporated's business was split between defendant

Reliant Energy, Inc. and Former Defendant CenterPoint Energy, Inc., which process was completed in October, 2002. Prior to the split and during the Relevant Time Period, defendants Reliant Energy, Inc. f/k/a Reliant Resources Inc. and CenterPoint Energy Services, Inc., f/k/a Reliant Energy Retail, Inc., were wholly owned and controlled subsidiaries of Reliant Energy, Incorporated. Defendant Reliant Energy, Inc., f/k/a Reliant Resources, Inc., is the successor in liability from Reliant Energy Incorporated. Reliant Energy, Inc., f/k/a Reliant Resources, Inc. wholly owned and controlled its subsidiary Reliant Energy Services, Inc. during the Relevant Time Period, a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc., buys, sells, and transports natural gas in the United States and in Wisconsin. On information and belief, grounds exist for disregarding the corporate fiction between the Reliant Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom*.

56. Defendant Reliant Energy, Inc., f/k/a Reliant Resources, Inc., directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in

Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Reliant Energy, Inc., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s officers or directors, such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s officers or directors, such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as Reliant Energy Services, Inc.

57. Personal jurisdiction exists over Reliant Energy, Inc., f/k/a Reliant Resources, Inc. based upon the activities of its corporate affiliates, in particular Reliant Energy Services, Inc., that traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. Reliant Energy, Inc. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. Reliant Energy, Inc., f/k/a Reliant Resources, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials.

58. Defendant Reliant Energy Services, Inc. is a Delaware corporation registered as a foreign corporation in good standing in Wisconsin during the Relevant Time Period with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly owned and controlled during the Relevant Time Period by its parent, Reliant Energy, Inc., f/k/a Reliant Resources, Inc., a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly owned and controlled by defendant Reliant Resources, Inc. concerning both the conduct of it business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. Reliant Energy Services, Inc. buys, sells, and transports natural gas in the United States and in

Wisconsin. On information and belief, during the Relevant Time Period Reliant Energy Services, Inc. sold natural gas to many members of the class, both itself and through middlemen, for use in Wisconsin. In November, 2003, Reliant Energy Services, Inc. paid an $18 million civil penalty to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, including charges of wash sales. The precise identity of the other parties that engaged in wash sales transactions with Reliant, are currently unknown to the plaintiffs, but on information and belief are the other defendants in this action and the non-defendant co-conspirators named below. In November, 2004, a former natural gas trader of Reliant Energy Services, Inc., Jerry A. Futch, was charged by the United States Department of Justice, U.S. Attorney's Office in the Southern District of Texas, based on a grand jury indictment for reporting false trades in 2000 and 2001 to industry price compilers which used the reported trades to calculate *Inside FERC*'s index price of natural gas. In 2005, Futch pled guilty to one count of delivering knowingly inaccurate reports concerning market information that affected and tended to affect the price of natural gas in interstate commerce.

59. Defendant Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), is liable for the debts and obligations of its wholly owned and controlled subsidiary Reliant Energy Services, Inc. and for the actions of CenterPoint Energy Services, Inc. (f/k/a Reliant Energy Retail, Inc.) during the relevant time period. Throughout the Relevant Time Period,

defendant Reliant Energy, Inc. was aware of the illegal behavior being engaged in by its subsidiaries, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding millions of dollars in profits from its subsidiaries to its consolidated financials. On information and belief, the way in which the subsidiaries were created and capitalized, and the parent company's moves relating to discontinuing operations, have left the subsidiaries with insufficient assets to pay the judgment that was foreseeable when Reliant Energy Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiaries.

60. CenterPoint Energy Services, Inc., f/k/a Reliant Energy Retail, Inc., is a corporation organized and existing under the laws of the State of Delaware, registered to do business in the State of Wisconsin, with its principal place of business located at 1111 Louisiana, Houston, Texas. CenterPoint Energy Services, Inc. was formerly known as CenterPoint Energy Marketing, Inc., CenterPoint Energy Gas Services, Inc., and Reliant Energy Retail, Inc. During the Relevant Time Period, CenterPoint Energy Services, Inc. was a wholly owned subsidiary of Reliant Energy, Incorporated and sold natural gas at unlawfully inflated prices directly to the plaintiff Ladish Co., Inc. for use in Wisconsin, and to many other members of the class, both itself and through middlemen. Personal jurisdiction exists over CenterPoint Energy Services based upon its activities and on the activities of its corporate

affiliates, that traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period.

I. Coral Energy Resources, L.P.

61. Defendant Coral Energy Resources, L.P. is a Delaware limited partnership in good standing with its principal place of business in Houston, Texas. Coral Energy Resources, L.P. is wholly owned and controlled by Coral Energy Holdings, L.P., and is an affiliate of Shell Oil Company, and Shell Trading Gas and Power Company. Coral Energy Resources, L.P. was one of the largest natural gas marketers in the United States and conducted natural gas marketing operations at eastern and western power and natural gas trading hubs for the Eastern and Western United States during the Relevant Time Period. Coral Energy Resources sells 100% of its parent companies' natural gas production. Coral Energy Resources, L.P. regularly conducts business in Wisconsin. Coral Energy Resources, L.P. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.

62. Defendant Coral Energy Resources, L.P. made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Coral Energy Resources, L.P.'s actions were intended to have, and did have, a direct,

substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Coral Energy Resources, L.P., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officers, directors and/or employees agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officers, directors, and/or employees made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Coral Energy Resources, L.P. sold in Wisconsin and elsewhere, and those policies and decisions were implemented on an operational level by Coral Energy Resources, L.P.'s employees in the United States and in Wisconsin. In July, 2004, Coral Energy Resources, L.P. paid $30 million in civil penalties to the United States Commodity Futures

Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. In March 2005, Coral Energy Resources, L.P. agreed to pay $3.5 million to resolve a dispute with the CFTC regarding whether it had sufficiently investigated, or accurately reported the results of its investigation, into trader false reporting of trades to index publishers during the Relevant Time Period. On information and belief, Coral and its affiliates engaged in nearly 150 wash trades during the Relevant Time Period. In February 2005 the CFTC filed federal civil injunction actions against Dennette Johnson, Courtney Cubbison Moore, Robert Harp, Anthony Dizona, John Tracy and Kelly Dyer—all employees or former employees of Shell Trading Gas and Power Company—seeking to bar their attempting to manipulate the price of natural gas in interstate commerce by reporting biased information to price reporting companies. Johnson, Moore, Harp, Dizona, Tracy and Dyer would regularly circulate an e-mail with directions to the traders to report prices in such a way that it would benefit either the positions of Shell Trading Gas and Power Company or Coral Energy Resources, L.P., to which the traders at Shell Trading Gas and Power Company provided services. This was done with the intent to manipulate prices during the Relevant Time Period. Further details regarding the conspiracy are set forth in *U.S. Commodity Futures Trading Commission v. Johnson*, 408 F. Supp. 2d 259 (S.D. Tex. 2005)(decision denying defendants' motion to dismiss).

J. The Xcel Defendants: Xcel Energy, Inc., E prime Inc. and Northern States Power Company

63. Defendant Xcel Energy, Inc., is a Minnesota corporation in good standing with its principal place of business in Minneapolis, Minnesota. Xcel Energy, Inc., wholly owned and controlled during the Relevant Time Period its subsidiary, E prime Inc., a Colorado corporation with its principal place of business in Denver, Colorado, its subsidiary Northern States Power Company, a Wisconsin corporation with its principal place of business in Eau Claire, Wisconsin, and NRG Energy, Inc., a Delaware corporation with its principal place of business in Minneapolis, Minnesota. On information and belief, grounds exist for disregarding the corporate fiction between the Xcel Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* Xcel Energy, Inc., and its affiliates or divisions engaged in energy marketing and trading, and transportation, storage, and marketing of natural gas in Wisconsin during the Relevant Time Period.

64. Defendant Xcel Energy, Inc., during the Relevant Time Period was one of the largest power companies in the United States. Xcel Energy, Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Xcel Energy, Inc.'s actions were

intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin, during the Relevant Time Period. On information and belief, during the Relevant Time Period Xcel Energy, Inc., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officers or directors, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and

* * *

65. Personal jurisdiction exists over Xcel Energy, Inc., based upon the activities of its corporate affiliates, in particular E prime Inc., Northern States Power Company and NRG Energy, Inc., which traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. Xcel Energy, Inc., and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials.

66. During the Relevant Time Period, Xcel Energy, Inc. owned and controlled NRG Energy, Inc. ("NRG"). NRG was formed in 1992 as a subsidiary of Northern States Power, which in 2000 was merged into New Century Energies, Inc., to form Xcel Energy, Inc. In 2001, NRG was one of the largest power companies worldwide, and sold natural gas to companies located in Wisconsin. In 2003, NRG commenced voluntary petitions under Chapter 11 of the bankruptcy code, and in November 2003, the bankruptcy court entered an order confirming NRG's plan of reorganization. From at least August 2001 through May 2002 *(i.e.*, during the time NRG was owned and controlled by Xcel Energy, Inc.), NRG traders knowingly delivered false trade reports to price index compilers such as *Gas Daily* for the purpose of influencing the price of natural gas in interstate commerce. In July 2004, the CFTC commenced an action against NRG seeking a permanent injunction precluding NRG from making false trade reports.

67. Defendant E prime Inc. is a Colorado corporation in good standing with its principal place of business in Denver, Colorado. E prime Inc. is wholly owned and controlled by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. E prime Inc. is wholly owned and controlled by defendant Xcel Energy, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance

of defendants' unlawful agreements, officers or directors of Excel Energy, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which E prime Inc. sold in Wisconsin and elsewhere. E prime Inc. provided during the Relevant Time Period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States and in Wisconsin. E prime Inc. entered into a long term GISB natural gas supply agreement with WE Energies (or one or more of its subsidiaries) during the Relevant Time Period, and on information and belief sold natural gas to WE Energies (or one or more of its subsidiaries) pursuant to that agreement. In January, 2004, Xcel Energy, Inc., and E prime Inc., paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

68. Defendant Northern States Power Company is a Wisconsin corporation with its principal place of business in Eau Claire Wisconsin. Northern States Power Company is wholly owned and controlled by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Northern States Power Company is wholly owned and controlled by defendant Xcel Energy, Inc., concerning both the conduct of its business generally within Wisconsin

and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of Excel Energy, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Northern States Power Company sold in Wisconsin and elsewhere. Northern States Power Company provided during the Relevant Time Period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States and in Wisconsin. In January, 2004, Northern States Power Company affiliated companies Xcel Energy, Inc., and E prime Inc., paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

ALLEGATIONS COMMON TO ALL DEFENDANTS

69. The unlawful arrangements, contracts, agreements, combination and conspiracy set forth in this Complaint have been committed by defendants and were ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of defendants' business or

affairs. At least by the summer of 2000, by their marketplace behavior and agreement as to pricing, defendants and the unnamed co-conspirators began and worked together to fraudulently increase the retail price of natural gas paid by commercial entities in Wisconsin. This fraudulent agreement is evidenced by, among other things, the daily exchange of price information by and among defendants and the unnamed co-conspirators and the use of computer software programs and websites (including Enron Online) by defendants and the unnamed co-conspirators, to collusively and artificially inflate the retail price of natural gas paid by commercial entities in Wisconsin. Traders at the defendants knew during the Relevant Time Period that price information being posted on Enron Online was inaccurate information, and rather than disregard that information, or report the inaccuracies, the traders went along with Enron's inaccurate price postings, frequently passed along those inaccurate postings to price index publishers, and themselves reported new inaccurate trade information to the publishers of indices so as to manipulate market prices.

70. In September 2002, five major traders and their companies, including defendants Dynegy Marketing & Trade, CMS Energy, Williams Energy Marketing & Trading, El Paso Merchant Energy, L.P., American Electric Power Company, admitted that they provided falsified information to *Gas Daily* and *Inside FERC*. The purpose and effect of these actions was to collusively and artificially inflate the price of natural gas paid by commercial entities in Wisconsin above competitive levels, forcing

commercial entity natural gas consumers in Wisconsin to pay much more for natural gas than they should have paid.

71. Upon information and belief, defendants were in regular and virtually continuous contact with one another, including regular and extremely frequent communications with respect to the spot price of natural gas and natural gas futures contracts.

72. Traders overstated prices to the reporting firms, which in turn published price data that incorporate the overstated prices. This pervasive false reporting in the natural gas market fed into the marketplace over and over again.

73. Defendants, directly or through their subsidiaries, affiliates, or agents, planned and executed a scheme designed to cause price instability and increase volatility in spot prices and thereby manipulate the price of natural gas futures. Defendants' unlawful conduct produced exorbitant illegal profits.

74. According to the CFTC, Platts' published indices had a financial impact upon billions of dollars worth of natural gas transactions during the Relevant Time Period. Between November 2000 and October 2002, more than three-quarters of the trades some of the defendants submitted to Platts were knowingly false or misleading.

75. Not all companies in the natural gas industry engaged in the illegal behavior in which the defendants engaged during the Relevant Time Period. For instance, on information and belief, BP

Energy Company was a major trader of natural gas in the United States during the Relevant Time Period, and established an effective program that ensured that the trading reports that BP Energy Company provided to publishers of price indices were accurate. The illegal behavior engaged in by the defendants was neither inevitable, nor natural, but was instead the result of a conscious decision by the defendants to collusively manipulate the markets to their advantage.

76. The behavior engaged in by the defendants that forms the basis of this suit was not routine business behavior, but was instead highly illegal behavior that has resulted in the criminal conviction or indictment of numerous industry insiders. This illegal behavior, and the hundreds of millions of dollars in lucre that has flowed to the defendants during the Relevant Time Period due to their engaging and permitting this illegal behavior, was only possible because the defendants agreed to report their false trades to the industry publications and newsletters identified above, and to structure their contracts such that those contracts were pegged to the false reports contained in those publications and newsletters. It was known in the natural gas producing and trading industry that these markets were subject to manipulation, and the defendants avoided taking steps to ensure that effective compliance and reporting programs were in place to prevent false reporting from occurring. Traders and executives at the defendants companies knew prior to the Relevant Time Period that false reporting could occur, knew early in the Relevant Time Period that Enron and many traders

throughout the industry were engaging in false reporting, and rather than reporting such, or resisting such, agreed to go along with the practice, which caused substantial damages to the plaintiff class in this case.

77. Various other persons, entities, companies and corporations not named as defendants, including some whose identities are presently unknown, participated as co-conspirators with defendants in the violations alleged herein and have made statements and performed acts in furtherance of those violations in the United States and elsewhere that had a direct, substantial, and reasonably foreseeable effect on commerce in Wisconsin. The co-conspirators include, but are not limited to, Enron Energy Services, Inc. and Enron Power Marketing, Inc., which paid a $35 million civil penalty (May 2004) to the CFTC; Aquila Merchant Services, Inc., which paid a $26,500,000 civil penalty (June 2004) to the CFTC; Ca1pine Energy Services, L.P., which paid a $1.5 million civil penalty (January, 2004) to the CFTC; Cinergy Marketing & Trading, LP, which paid a $3 million civil penalty (November, 2004) to the CFTC; Dominion Resources, Inc., which paid a $4.25 million civil penalty (September 2006) to the CFTC; Entergy Koch Trading L.P., which paid $3 million civil penalty (January 2004) to the CFTC; WD Energy Services Inc., f/k/a EnCana Energy Services, Inc., which paid a $20 million civil penalty (July, 2003) to the CFTC; Enserco Energy, Inc., which paid a $3 million civil penalty (July, 2003) to the CFTC; Entergy Koch Trading, L.P., which paid a $3 million civil penalty (January, 2004) to the CFTC; Mirant Americas Energy Marketing, L.P., which

paid a $12.5 million civil penalty (December, 2004) to the CFTC; NRG Energy, Inc.; Western Gas Resources, Inc., which paid a $7 million civil penalty (July 2004) to the CFTC; Sempra Energy, including affiliate Sempra Energy Trading, and their respective officers, directors, and employees.

78. The CFTC order relating to WD Energy Services indicates that at least one of WD Energy Services' employees discussed false reporting with traders at two other energy companies. While the plaintiffs do not know the precise identity of the other two energy companies, on information and belief, those two companies are defendants in this case.

79. Traders at Mirant Energy Marketing, L.P. conspired with one or more traders at Cinergy Corporation to make false reports of trades to market reporters so as to manipulate prices during the time period from January 2000 to early 2001. Specifically, Michael Whalen (a trader with Cinergy) had a telephone conversation with Christopher McDonald (a trader with Americas Energy Marketing, L.P.), wherein they conspired about how they should report false trades to *Inside FERC* to manipulate market prices, and how to make such reports believable, with Whalen saying to McDonald "hey, do you want to fax me . . . exactly what you guys are going to write down so its more believable . . . I'll just write the exact opposite." These actions lead the CFTC to file a civil federal injunctive action against Whalen and McDonald and other traders at Mirant.

80. In another example, between May 2000 and October 2002, Matthew Reed, Darrell Danyluk and Shawn McLaughlin engaged in false reporting and attempted manipulation of natural gas prices while employed by Enserco Energy Services. Reed continued to engage in coordinated false reporting after he left Enserco, and became a trader at Concord Energy LLC. While at Enserco, Reed in Colorado and Danyluk in Calgary coordinated on an almost daily basis how they wanted to report fictitious trades to numerous reporting firms, including *Gas Daily*, and *National Gas Intelligence*. Reed and Danyluk called this their "double dipping" scheme and perpetrated their scheme on reporting firms by portraying the Colorado and Calgary offices as separate trading operations when they were not. These actions lead the CFTC to file a civil federal injunctive action against Reed, Danyluk, McLaughlin and Concord Energy, LLC in February 2005.

81. While each of the two causes of action stated in this complaint are distinct and separate causes of action—with different elements and different available remedies—under each cause of action the plaintiffs allege that the defendants engaged in a conspiracy to manipulate prices as prohibited by Wis. Stat. § 133.03. As stated in further detail above and below, the defendants during the Relevant Time Period did the following:

a. The defendants engaged in "wash sales." A "wash sale" is an agreement by which Company A would agree with Company B that Company A would agree to sell a certain

amount of natural gas at a certain price to Company B, and that in return Company B would sell roughly the same amount of natural gas at roughly the some price to Company A. By doing this, Company A and Company B would create the illusion of higher demand, and a higher volume of sales, in the market place, and would thus achieve their objective of increasing or otherwise manipulate the price of natural gas sold in interstate commerce.

b. The defendants agreed with each other to and knowingly made false reports of natural gas trades to trade publications (such as *Gas Daily* and *Inside FERC*), knowing that those publications use those reports to report market prices and volumes, and knowing that by doing such they could manipulate markets to the detriment of natural gas buyers.

c. The defendants through the actions of their employees violated numerous criminal statutes which prohibit wash trades and which prohibit the false reporting of market information.

d. The illegal, criminal behavior of the defendants was widespread in the industry, and was well known to be occurring by traders in the industry throughout the Relevant Time Period.

VENUE AND JURISDICTION

82. Although there are several counties in Wisconsin in which venue in this matter would be appropriate and permitted, the resolution of this matter in Dane County, Wisconsin is appropriate and permitted by Wis. Stat. § 801.50 because Dane County is a County in which the claim arose, and one or more of the defendants do substantial business in Dane County, in that natural gas sold or traded by the defendants was consumed in Dane County.

83. This Court has personal jurisdiction over the defendants consistent with the due process clause of the United States Constitution, and pursuant to Wis. Stat. § 801.05, because:

a. Pursuant to Wis. Stat. § 801.05(1), defendant Northern States Power Company is organized and exists pursuant to Wisconsin law.

b. Pursuant to Wis. Stat. § 801.05(1)(d), each of the defendants has engaged in substantial and not isolated activities within the State of Wisconsin.

c. Pursuant to Wis. Stat. 801.05(4), each of the defendants directly or through an agent thereof committed one or more acts or omissions outside of Wisconsin, which caused an injury to person or property within Wisconsin, and during the Relevant Time Period, the defendants (either directly or on their behalf by others) carried out solicitation or service activities in Wisconsin, and natural

gas sold or otherwise handled by the defendants was used or consumed in Wisconsin.

d. Pursuant to Wis. Stat. § 801.05(5)(c), this action arises out of a promise made to one or more of the plaintiffs, or to a third party for the benefit of one or more of the plaintiffs, by a defendant to deliver or to receive in Wisconsin natural gas.

e. Pursuant to Wis. Stat. § 801.05(5)(e), because this action relates to natural gas actually received by one or more of the plaintiffs in Wisconsin from one or more of the defendants.

RELEVANT STATUTORY SECTIONS

84. This case involves the following four sections in Wisconsin's Antitrust Statute (Wis. Stat. ch. 133): §§ 133.01, 133.03, 133.14 and 133.18.

85. Wis. Stat. § 133.01 provides:

> **Legislative intent.**
>
> The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of

competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

86. Wis. Stat. § 133.03 provides:

Unlawful contracts; conspiracies.

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal.

87. Wisconsin's "Full Consideration Antitrust Statute, Wis. Stat. § 133.14, provides:

Illegal contracts void; recovery.

All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by § 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made

> upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

88. Wisconsin's "Treble Damages Antitrust Statute," Wis. Stat. § 133.18, in relevant part provides:

> (1) . . . [A]ny person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefore and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees.

89. Finally, Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, provides: "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."

CLASS ACTION

90. Plaintiffs bring this action both on behalf of themselves and on behalf of a class consisting of all industrial and commercial purchasers of natural gas for their own use or consumption during the Relevant Time Period, and which gas was used or consumed by them in Wisconsin. Excluded from the

Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) entities that purchased natural gas from entities that sold natural gas at rates approved by the Wisconsin Public Service Commission (to the extent of such purchases at such approved rates); (d) defendants and their predecessors, affiliates and subsidiaries; and (e) the federal government and its agencies..

91. This action is brought and may be properly maintained as a class action pursuant to Wis. Stat. § 803.08, which provides that "[w]hen the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court one or more may sue or defend for the benefit of the whole."

92. There exists questions of common and general interest to all members of the class, including, but not limited to: (a) whether the defendants engaged in a conspiracy in violation of Wis. Stat. § 133.03; (b) whether the plaintiffs and those Wisconsin purchasers of natural gas similarly situated are entitled to a "full consideration" recovery pursuant to Wis. Stat. § 133.14; and (c) whether the plaintiffs and those Wisconsin purchasers of natural gas similarly situated are entitled to recover treble damage pursuant to Wis. Stat. § 133.18. On information and belief the class is very numerous, numbering in the thousands, and it would be

impractical to bring all members of the class before the Court.

93. Plaintiffs are able to and will fairly represent the interests of the members of the class.

COUNT I: WIS. STAT. § 133.14 CLAIM

As and for their first cause of action, the plaintiffs allege as follows:

94. The plaintiffs incorporate by reference the allegations in all of the preceding numbered paragraphs.

95. The plaintiffs are commercial entities (including industrial and institutional entities) that have operations in Wisconsin.

96. During the Relevant Time Period, the plaintiffs entered into agreements to purchase natural gas for use in Wisconsin.

97. During the Relevant Time Period, the defendants were sellers of natural gas, and entered into contracts or agreements during the Relevant Time Period to sell natural gas for use or resale in Wisconsin.

98. During the Relevant Time Period, the defendants were each a member of a conspiracy prohibited by Wis. Stat. § 133.03.

99. While member(s) of a conspiracy prohibited by Wis. Stat. § 133.03, the defendants made agreements to sell natural gas which was purchased by one or more of the plaintiffs, and those agreements either directly or indirectly were the result of, grew out of

or were connected with a violation of Wis. Stat. § 133.03. Specifically, each of the defendants during the Relevant Time Period conspired to restrain trade or commerce relating to natural gas, and they received or benefited from the payments made by the plaintiffs pursuant to the plaintiffs' natural gas purchase agreements. Plaintiffs, and members of the class, purchased natural gas from the defendants or their affiliated companies, and from their co-conspirators, and also from third-parties, "middlemen" that were not parties to the conspiracy alleged herein, which middlemen purchased natural gas from the defendants or their affiliated companies, and from their co-conspirators.

100. The actions of the defendants resulted in the plaintiffs paying inflated prices for natural gas during the Relevant Time Period. During the Relevant Time Period, natural gas prices in Wisconsin more than doubled. The plaintiffs paid higher prices for natural gas than they otherwise would have paid if the defendants' conspiracy had not existed. The actual product around which the conspiracy centered was sold to purchasers in Wisconsin. The conspiracy also injured members of the class in Wisconsin, including the plaintiffs, by among other things, depriving them of the right and ability to make risk management, resource allocation and other financial decisions relating to natural gas, in a full and free competitive market.

101. Because of the defendants' conspiracy in violation of § 133.03, the contracts or agreements the defendants entered into during the Relevant Time Period, which contracts or agreements were founded

upon, are the result of or which grew out of or is connected with the defendants' violation of Wis. Stat. § 133.03, are void under the first sentence of Wis. Stat. § 133.14. Furthermore, under the second sentence of Wis. Stat. § 133.14, the plaintiffs are entitled to recover from the defendants in this action the payments they made upon, under or pursuant to those void contracts or agreements, which payments were made either directly to any of the defendants, or to or for the benefit of any defendant, if and as the defendants benefited from those payments.

COUNT II: WIS. STAT. § 133.18 CLAIM

As and for their second cause of action, the plaintiffs allege as follows:

102. The plaintiffs incorporate by reference the allegations in all of the preceding numbered paragraphs.

103. The defendants engaged in conduct prohibited by Wis. Stat. ch. 133. Specifically, the defendants violated Wis. Stat. § 133.03 during the Relevant Time Period by making contracts or engaging in a combination or conspiracy in restraint of trade or commerce relating to natural gas.

104. The plaintiffs were injured, directly or indirectly, by the defendants' violation of Wis. Stat. § 133.18, in that the plaintiffs paid higher prices for natural gas during the Relevant Time Period than they would have if the defendants had not violated Wis. Stat. § 133.03.

DEMAND FOR JUDGMENT

WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated, demand judgment in their favor and against defendants as follows:

A. That the Court certify the class as described herein and permit this action to proceed as a class action with one or more of the plaintiffs named herein as the designated representatives of the class;

B. A declaration pursuant to Wis. Stat. § 133.14 and Wis. Stat § 806.04 that the above described contracts and agreements that the defendants entered into during the Relevant Time Period are void, and further that the defendants are jointly and severally liable pursuant to Wis. Stat. § 133.14 to the plaintiffs for repayment of the amounts the plaintiffs paid for natural gas during the Relevant Time Period as the defendants benefited from those payments, in an amount to be determined at trial;

C. Pursuant to Wis. Stat. § 133.18(1)(a), an award of three times the plaintiffs actual damages, in an amount to be determined at trial, reduced after trebling by any amount actually recovered under plaintiffs' § 133.14 claim for the same injury.

D. An award of the costs and disbursements of this action, including class notice costs and interest;

E. An award of attorneys' fees pursuant to Wis. Stat. § 133.18(1)(a), or as otherwise may be permitted by Wisconsin law, for the services herein rendered by class counsel;

F. Pre-judgment and post judgment interest in the full amount as may be permitted by law; and

G. Any and all other relief to which plaintiffs are entitled, in equity or at law, under the laws of the State of Wisconsin.

DEMAND FOR JURY TRIAL

Plaintiffs request trial by jury of all issues so triable.

REQUEST FOR EXPEDITED PROCEEDINGS

Wis. Stat. § 133.18(5) provides:

> Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date.

Pursuant to Wis. Stat. § 133.18(5), plaintiffs request that this action and all motions and proceedings in this action be expedited, consistent with the intent and remedial goals of the Wisconsin legislature as expressed in Wis. Stat. §§ 133.01 and 133.18(5).

Dated this 3rd day of November, 2009.

KOHNER, MANN & KAILAS, S.C.,
Attorneys for the Plaintiffs

By: */s/ William E. Fischer*

Robert L. Gegios
State Bar No. 1002906
Alexander T. Pendleton
State Bar No. 1011759

William E. Fischer
State Bar No. 1045725
KOHNER, MANN &
KAILAS, S.C.
Barnabas Business Center
4650 N. Port Washington Road
Milwaukee, WI 53212-1059
Telephone: (414) 962-5110
Facsimile: (414) 962-8725

Co-Counsel:

R. Lawrence Ward
R. Daniel Boulware
Jennifer Gille Bacon
Gregory M. Bentz
SHUGHART, THOMSON &
KILROY, P.C.
120 West 12th Street
Kansas City, Missouri 64105
Telephone: 816-421-3355
Facsimile: 816-374-0509

Donald D. Barry
BARRY LAW OFFICES, L.L.C.
5340 S.W. 17th Street
Topeka, Kansas 66604
Telephone: 785-273-3153
Facsimile: 785-273-3159

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL Docket No. 1566

Case Nos.
2:03-CV-1431-PMP-PAL Base File
2:06 CV-023-PMP-PAL

IN RE WESTERN STATES WHOLESALE
NATURAL GAS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

LEARJET, INC., and
TOPEKA UNIFIED SCHOOL DISTRICT 501
on Behalf of Themselves
and All Other Similarly Situated Direct
Purchasers of Natural Gas in the
State of Kansas

Plaintiffs,

v.

ONEOK INC.,
ONEOK ENERGY MARKETING AND
TRADING COMPANY, L.P.,
KANSAS GAS MARKETING COMPANY,
THE WILLIAMS COMPANIES, INC.,
WILLIAMS MERCHANT SERVICES
COMPANY, INC.,
WILLIAMS ENERGY MARKETING &

TRADING,
AMERICAN ELECTRIC POWER COMPANY,
AEP ENERGY SERVICES, INC.,
DUKE ENERGY CORPORATION,
DUKE ENERGY TRADING AND
MARKETING COMPANY, L.L.C.,
DYNEGY MARKETING & TRADE,
EL PASO CORPORATION,
EL PASO MERCHANT ENERGY, L.P.,
CMS ENERGY CORPORATION,
CMS MARKETING SERVICES &
TRADING COMPANY,
CMS FIELD SERVICES,
RELIANT ENERGY, INC.,
RELIANT ENERGY SERVICES, INC.,
CORAL ENERGY RESOURCES, L.P.,
XCEL ENERGY, INC. and
E PRIME INC.,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs, Learjet, Inc., and Topeka Unified School District 501, on behalf of themselves and all others similarly situated, by and through their attorneys, bring this action for damages and other relief under Chapter 50, Unfair Trade and Consumer Protection, Article 1 — The Kansas Restraint of Trade Act, Kansas Statutes Annotated § 50-101 et seq., and allege as follows:

JURISDICTION AND DAMAGES

1. Plaintiffs bring this action pursuant to the Kansas Statutes Annotated § 50-101, § 50-108, § 50-112, § 50-115, § 50-117, and § 50-161 to obtain damages and injunctive and other equitable relief which plaintiffs and other members of the class have sustained due to violations by defendants named herein of these statutes.

2. Plaintiffs commenced this action in the District Court for the County of Wyandotte, Kansas. Venue was proper in the County of Wyandotte pursuant to the provisions of Kansas Statutes Annotated § 50-110, § 50-108, § 50-115, § 50-117, § 50-161, § 60-604 and § 60-605. One or more of the defendants maintains an office, transacts business, has an agent or is found in the County of Wyandotte. Many of the unlawful acts done pursuant to the arrangements, contracts, agreements, combination and conspiracy alleged herein, had a direct and substantial effect on plaintiffs and other members of the class within the State of Kansas and within the County of Wyandotte. The trade and commerce hereinafter described is carried on, in part, within the State of Kansas including the County of Wyandotte. Defendants, directly and through affiliates they dominate and control, performed unlawful acts in furtherance of their illegal arrangements, contracts, agreements, combination and conspiracy within the State of Kansas and the United States that were intended to have, and did have, a direct and substantial and reasonably foreseeable effect on plaintiffs and other members of the class in the State of Kansas and the County of

Wyandotte. This action may be brought in the County of Wyandotte pursuant to the provisions of Kansas Statutes Annotated § 50-110, § 50-108, § 50-115, § 50-117, § 50-161, § 60-604 and § 60-605. Personal jurisdiction exists over all defendants, in part, based upon the activities of their corporate affiliates, pursuant to Kansas Statutes Annotated § 60-308 of the Kansas Rules of Civil Procedure, and upon certain defendants' registration as foreign corporations doing business in the State of Kansas.

3. Defendants removed this action from the District Court for the County of Wyandotte, Kansas to the United States District Court for the District of Kansas pursuant to the Class Action Fairness Act, 28 U.S.C. § 1711 et seq. The Judicial Panel on Multidistrict Litigation then transferred this action from the District of Kansas to the District of Nevada for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. At an appropriate time, Plaintiffs intend to seek remand to the District of Kansas.

THE PARTIES

4. Plaintiff, Learjet, Inc. ("Learjet") is a Delaware corporation with its principal place of business at One Learjet Way, Wichita, Kansas 67277. Learjet purchased natural gas for use at its facilities located in the State of Kansas directly from one or more of the defendants, and from other sellers of natural gas in the State of Kansas, during the past six years. Plaintiff's purchases of natural gas during the relevant time period were at market prices which were affected by the defendants' manipulations.

5. Plaintiff, Topeka Unified School District 501 ("USD 501"), is a local government unit, duly organized under the laws of the State of Kansas, with its administrative headquarters located at 624 West 24th Street, Topeka, Kansas, 66611. USD 501 purchased natural gas for use at its facilities located in the State of Kansas directly from one or more of the defendants, during the years 2000-2002. Plaintiff's purchases of natural gas during the relevant time periods were at prices which were based upon and determined by published indices.

6. Defendant ONEOK Inc. is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. ONEOK Inc., wholly controls and dominates ONEOK Energy Marketing and Trading Company, L.P., Kansas Gas Marketing Company and other affiliates or divisions that regularly conduct business in the State of Kansas. ONEOK Inc. buys, sells, transports, and stores natural gas, including its own and its affiliates' production, in the United States and in the State of Kansas.

7. Defendant ONEOK Inc. directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. ONEOK Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas

during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officer(s) and/or director(s), including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officer(s) or director(s), including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as ONEOK Energy Marketing and Trading Company, L.P., in the United States and in the State of Kansas.

8. Personal jurisdiction exists over ONEOK Inc. based upon the activities of its corporate affiliates, in particular ONEOK Energy Marketing and Trading Company, L.P., that traded and sold natural gas in the United States and in the State of Kansas during the relevant period. ONEOK, Inc. and its affiliates

consistently have presented a common corporate image to customers in the United States and in the State of Kansas through their marketing efforts and materials. As more fully described in Paragraph 56 below, in October, 2002, ONEOK, Inc. and ONEOK Energy Marketing and Trading, L.P., each paid $3 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting of natural gas prices.

9. Defendant ONEOK Energy Marketing and Trading Company, L.P., is a Delaware limited partnership in good standing and has its principal place of business in Tulsa, Oklahoma. ONEOK Energy Marketing and Trading Company, L.P., is wholly controlled and dominated by defendant ONEOK, Inc. concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy, officer(s) and/or director(s) of ONEOK, Inc., including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which ONEOK Energy Marketing and Trading Company, L.P. sold in Kansas and elsewhere. ONEOK Energy Marketing and Trading Company, LP., buys, sells,

stores, and transports natural gas, including its own or its affiliates' production, in the United States and in the State of Kansas.

10. Defendant Kansas Gas Marketing Company is a Kansas corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Defendant Kansas Gas Marketing Company is wholly controlled and dominated by defendant ONEOK Inc. concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy, officer(s) and/or director(s) of ONEOK, Inc. made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Kansas Gas Marketing Company sold in Kansas and elsewhere. Kansas Gas Marketing Company buys, sells, stores and transports natural gas, including its own or its affiliates' production, in the United States and in the State of Kansas.

11. Defendant The Williams Companies, Inc. is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. The Williams Companies, Inc. wholly controls and dominates Williams Energy Marketing & Trading, Williams Merchant Services Company, Inc. and other affiliates or divisions that regularly conduct

business in the State of Kansas. The Williams Companies, Inc. through its affiliates, buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in the State of Kansas.

12. Defendant The Williams Companies, Inc. directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. The Williams Companies, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officer(s) and/or director(s), such as William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officer(s) or director(s), such as William E. Hobbs, President

and Chief Executive Officer of Williams Energy Marketing & Trading, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Williams Energy Marketing & Trading and Williams Merchant Services Company, Inc. in the United States and in the State of Kansas.

13. Personal jurisdiction exists over The Williams Companies, Inc. based upon the activities of its corporate affiliates, in particular Williams Merchant Services Company, Inc. and Williams Energy Marketing & Trading, that traded and sold natural gas in the United States and in the State of Kansas during the relevant period. The Williams Companies, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in the State of Kansas through their marketing efforts and materials. William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, is "Senior Officer" of The Williams Companies, Inc. As more fully described in Paragraph 55 below, The Williams Companies, Inc. and Williams Energy Marketing & Trading Company paid $20 Million, in civil penalties in July, 2003 to the United States Commodity Futures Trading Commission to settle charges of attempting to manipulate natural gas price indices. On December 17, 2004, a former trader of Williams Energy Marketing & Trading Company, Thomas J. Pool, pled guilty to conspiring

with other Williams' traders to provide false natural gas price data to reporting firms from mid-1998 through mid-2002 for the purpose of manipulating monthly price indices of natural gas at Southern California Gas, El Paso Natural Gas in the San Juan Basin, and Colorado Interstate Gas in the Rockies. Mr. Pool admitted creating fictitious natural gas trades at the behest of his supervisor. On May 20, 2005, a former trader of Williams Energy Marketing & Trading Company, Brion Scott McKenna, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms, *Inside FERC's Gas Market Report* and *NGI's Bidweek Survey*, from September, 2000 to June 30, 2002 for the purpose of manipulating published index prices of natural gas in the West Coast, East Coast, Gulf Coast and Rocky Mountain regions of the United States. Mr. McKenna admitted in his Plea Agreement to successfully manipulating the index prices of natural gas on February 1, 2001 at the following locations: Columbia Gas Transmission Corp. at Appalachia; Florida Gas Transmission Co. pipeline at Zones 2 and 3; Natural Gas Pipeline Co. of America pipeline at Louisiana; Transcontinental Gas Pipeline Corp. at Zone 2; and Transco Zone 6 Market Center. Mr. McKenna admitted in his Plea Agreement that by reporting false trades, he intended to influence the price published by *Inside FERC* and *NGI* at each location for which he reported, and to the extent that his false trade information was included in the respective index calculations, the published index prices did not reflect the legitimate forces of supply and demand.

14. Defendant Williams Merchant Services Company, Inc. ("Williams Services"), is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. is wholly controlled and dominated by its parent company, The Williams Companies, Inc. a Delaware corporation with headquarters in Tulsa, Oklahoma. Williams Merchant Services Company, Inc., wholly controls and dominates Williams Energy Marketing & Trading. Williams Merchant Services Company, Inc. is wholly controlled and dominated by The Williams Companies, Inc., concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and director(s) of The Williams Companies, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Merchant Services Company, Inc. or its affiliate Williams Energy Marketing & Trading sold in Kansas and elsewhere. Williams Merchant Services Company, Inc. buys, sells, stores and transports natural gas, including its own or its

affiliates' production, in the United States and in the State of Kansas.

15. Defendant Williams Energy Marketing & Trading is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Defendant Williams Energy Marketing & Trading is wholly controlled and dominated by Williams Merchant Services Company, Inc., which in turn is wholly controlled and dominated by its parent, defendant The Williams Companies, Inc. Defendant Williams Energy Marketing & Trading is wholly controlled and dominated by defendants, Williams Merchant Services Company, Inc. and The Williams Companies, Inc., concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and director(s) of The Williams Companies, Inc. and Williams Merchant Services Company, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Energy Marketing & Trading sold in Kansas and elsewhere. Defendant Williams Energy Marketing & Trading buys, sells, and transports natural gas,

including its own or its affiliates' production, in the United States and in the State of Kansas.

16. Defendant American Electric Power Company is a New York corporation in good standing and has its principal place of business in Columbus, Ohio. The American Electric Company wholly controlled and dominated during the relevant period its subsidiary AEP Energy Services, Inc., an Ohio corporation with its principal place of business in Columbus, Ohio. Defendant American Electric Power Company buys, sells, transports electricity and natural gas, including its own and its affiliates' production, in the United States and in the State of Kansas.

17. Defendant American Electric Power Company, directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. American Electric Power Company's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officer(s) and/or director(s) agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of

natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officer(s) or director(s), made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as AEP Energy Services, Inc.

18. Personal jurisdiction exists over American Electric Power Company based upon the activities of its corporate affiliates, in particular AEP Energy Services, Inc., that sold natural gas in the United States and in the State of Kansas during the relevant period. American Electric Power Company, and its affiliates consistently have presented a common corporate image to customers in the United States and in the State of Kansas through their marketing efforts and materials.

19. Defendant AEP Energy Services, Inc. is an Ohio corporation in good standing and has its principal place of business in Columbus, Ohio. AEP Energy Services, Inc. is wholly controlled and dominated by its parent, American Electric Power Company, an Ohio corporation with headquarters in Columbus, Ohio. AEP Energy Services, Inc. is wholly controlled and dominated by defendant

American Electric Power Company concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful agreements, officer(s) and director(s) of American Electric Power Company, Inc. made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which AEP Energy Services, Inc. sold. AEP Energy Services, Inc. bought, sold and transported natural gas during the relevant period, including its own or its affiliates' production, in the United States and in the State of Kansas. As more fully described in Paragraph 55 below, in January 2005, American Electric Power Company and AEP Energy Services, Inc. paid $30 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. AEP Energy Services, Inc. also paid $30 Million in civil penalties to the United States Department of Justice while acknowledging and accepting responsibility for submitting knowingly inaccurate trade information for its Gulf Natural Gas Trading Desk, and for two other trading desks covering the Northeast and Mid-Continent regions.

20. Defendant Duke Energy Corporation is a North Carolina corporation with its principal place of business in Charlotte, North Carolina. Duke Energy

Corporation wholly controls and dominates its subsidiary, Duke Energy Trading and Marketing Company, L.L.C., a Delaware limited liability corporation with its principal place of business in Houston, Texas. Duke Energy Corporation wholly controls and dominates Duke Energy Trading and Marketing Company, L.L.C., and other affiliates that regularly conduct business in the State of Kansas.

21. Defendant Duke Energy Corporation directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Duke Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officer(s) and/or director(s) agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officer(s) or director(s) made strategic marketing policies and decisions concerning natural

gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Duke Energy Trading and Marketing Company, L.L.C., in the United States and in the State of Kansas.

22. Personal jurisdiction exists over Duke Energy Corporation based upon the activities of its corporate affiliates, in particular Duke Energy Trading and Marketing, L.L.C., that traded and sold natural gas in the United States and in the State of Kansas during the relevant period. Duke Energy Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in the State of Kansas, through their marketing efforts and materials. As more fully described in Paragraph 55 below, in September, 2003, Duke Energy Corporation and Duke Energy Trading and Marketing, L.L.C. paid $28 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

23. Defendant Duke Energy Trading and Marketing Company, L.L.C. is a Delaware limited liability corporation registered as a foreign corporation in the State of Kansas, with its principal place of business in Houston, Texas. Duke Energy Trading and Marketing Company, L.L.C. is wholly controlled and dominated by its parent, Duke Energy Corporation, a Delaware corporation with its

principal place of business in Charlotte, North Carolina. Duke Energy Trading and Marketing Company, L.L.C. is wholly controlled and dominated by defendant Duke Energy Corporation concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and director(s) of Duke Energy Corporation made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Duke Energy Trading and Marketing Company, L.L.C. sold in Kansas and elsewhere. On or about February 1, 2005, the Commodity Futures Trading Commission filed a civil action in the United States District Court for the Southern District of Texas, against Michael Whitney, a former energy trader of Duke Energy Trading and Marketing Company, alleging that Whitney submitted or caused to be submitted false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, concerning natural gas transactions which he executed between June, 2001 and August, 2002. Duke Energy Trading and Marketing Company, L.L.C. buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in the State of Kansas.

24. Defendant Dynegy Marketing & Trade is a Colorado general partnership in good standing with its principal place of business in Houston, Texas. Dynegy Marketing & Trade is wholly controlled and dominated by its general partners, DMT Holdings, L.P. and Dynegy GP Inc. Dynegy Marketing & Trade was one of the largest natural gas marketers in the United States and in 2001, Dynegy Marketing & Trade's natural gas sales averaged 8.2 billion cubic feet per day. Dynegy Marketing & Trade regularly conduct business in the State of Kansas.

25. Defendant Dynegy Marketing & Trade made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Dynegy Marketing & Trade's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officer(s) and/or director(s), such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in the State of Kansas.

During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officer(s) or director(s), such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Dynegy Marketing & Trade sold in Kansas and elsewhere, and those policies and decisions were implemented on an operational level by Dynegy Marketing & Trade's employees in the United States and in the State of Kansas. On September 25, 2002, Dynegy announced it had discovered that 15 of its employees had engaged in reporting false data to price compilers. Of those, seven were fired, four were given the opportunity to resign, and four were otherwise disciplined by the company. As more fully described in Paragraph 55 below, in December, 2002, Dynegy Marketing & Trade and West Coast Power LLC, paid $5 Million in civil penalties to the United States Commodity Future Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

26. Defendant El Paso Corporation is a Delaware corporation in good standing with its principal place of business in Houston, Texas. El Paso Corporation wholly controls and dominates its subsidiary, El Paso Merchant Energy, L.P., a Delaware limited partnership with its principal place of business in Houston, Texas. El Paso Corporation buys, sells,

stores, and transports natural gas, including its own or its affiliates' production, in the United States and in the State of Kansas.

27. Defendant El Paso Corporation directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. El Paso Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officer(s) and/or director(s), such as Ralph Eads, Executive Vice President of El Paso, agreed to arrangements, contracts, agreements, and to a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officer(s) or director(s), such as Ralph Eads, Executive Vice President, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected

the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as El Paso Merchant Energy, L.P., in the United States and in the State of Kansas.

28. Personal jurisdiction exists over El Paso Corporation based upon the activities of its corporate affiliates, in particular El Paso Merchant Energy, L.P., that traded and sold natural gas in the United States and in the State of Kansas during the relevant period. El Paso Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in the State of Kansas through their marketing efforts and materials. As more fully described in Paragraph 55 below, in March, 2003, El Paso Corporation and El Paso Merchant Energy, L.P., paid $20 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. In November, 2004, three former natural gas traders of El Paso Merchant Energy, L.P., Donald E. Burwell, James P. Phillips, and Greg Singleton, were charged by the United States Department of Justice, U.S. Attorney's Office for the Southern District of Texas, with indictments of conspiracy, false reporting, and wire fraud related to the transmission of allegedly inaccurate trade reports to industry price compilers which used the reported trades to calculate the index price of natural gas.

29. Defendant El Paso Merchant Energy, L.P. is a Delaware limited partnership with its principal

place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly controlled and dominated by its parent company, El Paso Corporation, a Delaware corporation with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly controlled and dominated by defendant El Paso Corporation concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful agreements, officer(s) and/or director(s) of El Paso Corporation, such as Ralph Eads, Executive Vice President of El Paso Corporation and President of El Paso's Merchant Energy Group, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which El Paso Merchant Energy, LP. sold in Kansas and elsewhere. El Paso Merchant Energy, L.P. buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in the State of Kansas.

30. Defendant CMS Energy Corporation is a Michigan corporation in good standing with its principal place of business in Jackson, Michigan. CMS Energy Corporation wholly controlled and dominated during the relevant period its subsidiary CMS Marketing Services & Trading Company, a Michigan corporation with its principal place of business in Houston, Texas. CMS Energy

Corporation wholly controlled and dominated during the relevant period CMS Field Services, a Michigan corporation with its principal place of business in Tulsa, Oklahoma. CMS Energy Corporation wholly controlled and dominated CMS Marketing Services & Trading Company, CMS Field Services, and other affiliates or divisions that regularly conducted business in the State of Kansas during the relevant period.

31. Defendant CMS Energy Corporation, directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. CMS Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, CMS Energy Corporation's officer(s) and/or director(s), such as Victor J. Fryling, President and Chief Operating Officer, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts,

agreements, and combination and conspiracy, CMS Energy Corporation's officer(s) or director(s), such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as CMS Marketing Services & Trading Company and CMS Field Services, in the United States and in the State of Kansas.

32. Personal jurisdiction exists over CMS Energy Corporation based upon the activities of its corporate affiliates, in particular CMS Marketing, Services & Trading Company and CMS Field Services, that traded and sold natural gas in the United States and in the State of Kansas during the relevant period. CMS Energy Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in the State of Kansas through their marketing efforts and materials. As more fully described in Paragraph 55 below, in November, 2003, CMS Energy Corporation, CMS Marketing, Services & Trading Company, and CMS Field Services paid $16 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

33. Defendant CMS Marketing Services & Trading Company was a Michigan corporation

registered as a foreign corporation in good standing in the State of Kansas during the relevant period with its principal place of business in Houston, Texas. CMS Marketing Services & Trading Company was wholly controlled and dominated during the relevant period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS Marketing Services & Trading Company was wholly controlled and dominated by defendant CMS Energy Corporation concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful agreements, officer(s) and/or director(s) of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Marketing Services & Trading Company sold. CMS Marketing Services & Trading Company bought, sold and transported natural gas, including its own or its affiliates' production, during the relevant period in the United States and in the State of Kansas.

34. Defendant CMS Field Services was a Michigan corporation in good standing during the relevant period with its principal place of business in Tulsa, Oklahoma. CMS Field Services was wholly controlled and dominated during the relevant period

by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS Field Services changed its name after the relevant period to CMS Continental Natural Gas, Inc., and later to Cantera Gas Company. CMS Field Services was wholly controlled and dominated by defendant CMS Energy Corporation concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and/or director(s) of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Field Services and CMS Marketing Services & Trading Company sold. On or about February 1, 2005, the Commodity Futures Trading Commission filed a civil action in United States District Court for the Northern District of Oklahoma, against Jeffrey A. Bradley and Robert L. Martin, former traders of CMS Field Services, alleging that they conspired to submit false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, between January, 2001 and October, 2002. In one telephone conversation between Bradley and Martin these men "openly discussed a

plan to 'make up some numbers and turn them into the reporting firms.'" CMS Field Services bought, sold, stored, and transported natural gas, including its own or its affiliates' production, during the relevant period in the United States and in the State of Kansas.

35. Defendant Reliant Energy, Inc. is a Delaware corporation in good standing with it principal place of business in Houston, Texas. In April, 2004, Reliant Energy, Inc. officially changed its name from Reliant Resources, Inc. Reliant Resources, Inc. wholly controlled and dominated its subsidiary Reliant Energy Services, Inc. during the relevant period, a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc., buys, sells, and transports natural gas in the United States and in the State of Kansas.

36. Defendant Reliant Energy, Inc., f/k/a Reliant Resources, Inc., directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc.' s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and

conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s officer(s) and/or director(s), such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s officer(s) or director(s), such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as Reliant Energy Services, Inc.

37. Personal jurisdiction exists over Reliant Energy, Inc., f/k/a Reliant Resources, Inc. based upon the activities of its corporate affiliates, in particular Reliant Energy Services, Inc., that traded and sold natural gas in the United States and in the State of Kansas during the relevant period. Reliant Energy, Inc., f/k/a Reliant Resources, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States

and in the State of Kansas through their marketing efforts and materials.

38. Defendant Reliant Energy Services, Inc. is a Delaware corporation registered as a foreign corporation in good standing in the State of Kansas during the relevant period with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly controlled and dominated during the relevant period by its parent, Reliant Energy, Inc., f/k/a Reliant Resources, Inc., a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly controlled and dominated by defendant Reliant Resources, Inc. concerning both the conduct of it business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. Reliant Energy Services, Inc. buys, sells, and transports natural gas in the United States and in the State of Kansas. As more fully described in Paragraph 55 below, in November, 2003, Reliant Energy Services, Inc. paid a $18 Million civil penalty to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, including charges of wash sales. In November, 2004, a former natural gas trader of Reliant Energy Services, Inc., Jerry A. Futch, was charged by the United States Department of Justice, U.S. Attorney's Office in the Southern District of Texas, in an indictment for reporting false trades to industry price compilers which used the reported trades to calculate *Inside FERC*'s index price of natural gas.

39. Defendant Coral Energy Resources, L.P. is a Delaware limited partnership in good standing with its principal place of business in Houston, Texas. Coral Energy Resources, L.P. is wholly controlled and dominated by Coral Energy Holdings, L.P., and is an affiliate of Shell Oil Company. Coral Energy Resources, L.P. was one of the largest natural gas marketers in the United States and conducted natural gas marketing operations at eastern and western power and natural gas trading hubs for the Eastern and Western United States during the relevant period. Coral Energy Resources, L.P. regularly conducts business in the State of Kansas.

40. Defendant Coral Energy Resources, L.P. made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Coral Energy Resources, L.P.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officer(s), director(s) and/or employee(s) agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in the State of Kansas.

During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officer(s), director(s), and/or employee(s) made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Coral Energy Resources, L.P. sold in Kansas and elsewhere, and those policies and decisions were implemented on an operational level by Coral Energy Resources, L.P.'s employees in the United States and in the State of Kansas. As more fully described in Paragraph 55 below, in July, 2004, Coral Energy Resources, L.P. paid $30 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

41. Defendant Xcel Energy, Inc., is a Minnesota corporation in good standing with its principal place of business in Minneapolis, Minnesota. Xcel Energy, Inc., wholly controlled and dominated during the relevant period its subsidiary, E prime Inc., a Colorado corporation with its principal place of business in Denver, Colorado. Xcel Energy, Inc., and its affiliates or divisions engaged in energy marketing and trading, and transportation, storage, and marketing of natural gas that regularly conducted business in the State of Kansas during the relevant period.

42. Defendant Xcel Energy, Inc., directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Xcel Energy, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas, during the relevant period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officer(s) and/or director(s), agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in the State of Kansas. During the relevant period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officer(s) or director(s), made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as E prime Inc., in the United States and in the State of Kansas.

43. Personal jurisdiction exists over Xcel Energy, Inc., based upon the activities of its corporate affiliates, in particular E prime Inc., that traded and sold natural gas in the United States and in the State of Kansas during the relevant period. Xcel Energy, Inc., and its affiliates consistently have presented a common corporate image to customers in the United States and in the State of Kansas through their marketing efforts and materials.

44. Defendant E prime Inc. is a Colorado corporation in good standing with its principal place of business in Denver, Colorado. E prime Inc. is wholly controlled and dominated by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. E prime Inc. is wholly controlled and dominated by defendant Xcel Energy, Inc., concerning both the conduct of its business generally within the State of Kansas and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the relevant period and in furtherance of defendants' unlawful agreements, officer(s) and/or director(s) of Excel Energy, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which E prime Inc. sold in Kansas and elsewhere. E prime Inc. provided during the relevant period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States

and in the State of Kansas. As more fully described in Paragraph 55 below, in January, 2004, Xcel Energy, Inc., and E prime Inc., paid $16 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

45. The unlawful activities of the alleged unlawful arrangements, contracts, agreements, combination and conspiracy set forth in this Second Amended Complaint have been committed by defendants and were ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of defendants' business or affairs. Various other persons, entities, companies and corporations not named as defendants, including some whose identities are presently unknown, participated as co-conspirators with defendants in the violations alleged herein and have made statements and performed acts in furtherance of those violations in the United States and elsewhere that had a direct, substantial, and reasonably foreseeable effect on United States commerce and on commerce in the State of Kansas. The co-conspirators include, but are not limited to, Enron Energy Services, Inc.; Enron Power Marketing, Inc.; Calpine Energy Services, L.P. which paid a $1.5 Million civil penalty (January, 2004) to the CFTC; Cinergy Marketing & Trading, LP which paid a $3 Million civil penalty (November, 2004) to the CFTC; WD Energy Services Inc., f/k/a EnCana Energy Services, Inc., which paid a $20 Million civil penalty (July, 2003) to the CFTC; Enserco Energy,

Inc., which paid a $3 Million civil penalty (July, 2003) to the CFTC; Entergy Koch Trading, L.P., which paid a $3 Million civil penalty (January, 2004) to the CFTC; Mirant, which paid a $12.5 Million civil penalty (December, 2004) to the CFTC; NRG Energy, Inc.; Sempra Energy, including affiliate Sempra Energy Trading, and their respective officers, directors, and employees.

NATURE OF THIS ACTION

46. Defendants and their co-conspirators during the relevant period (at least January 1, 2000 through October 31, 2002) marketed natural gas, including their own or their affiliates' production, to plaintiffs and other customers in the State of Kansas, and throughout the United States in a multi-billion dollar industry. The natural gas purchased by plaintiffs during the relevant period was deregulated pursuant to various statutory provisions. *See*, The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301(21) (1994) (first sales are defined in § 2(21)); Section 601(a)(1)(C) of the NGPA, as amended by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60 (no FERC jurisdiction over first sales); The Energy Policy Act of 1992, 15 U.S. Code § 3431 and pursuant to Federal Energy Regulatory Commission Order No. 547, 61 FERC 61281 (November 30, 1992), Order No. 636, 57 FERC 30939 (April 8, 1992), and Order No. 636-A, 57 FERC 36128 (August 12, 1992).

47. Reporting firms compiled and published indices of natural gas prices for natural gas trading hubs throughout the United States during the relevant period. These reporting firms divided the

natural gas traders into groups, referred to as Desks. Some of the Desks corresponded with geographic regions of the United States: the Gulf Coast, the West, the Northwest, the Northeast, and the Mid-continent Desks. The State of Kansas was included in the Mid-continent Desk. The price compilers used prices and volume information in calculating indices of natural gas prices for various hubs throughout the United States. The price compilers include Platts, a division of The McGraw-Hill Companies, which issues a monthly index for various natural gas hubs entitled *Inside FERC Gas Market Report* ("IFERC"), and a daily index for various natural gas hubs entitled Gas Daily. Other price indices which received false trade information included *National Gas Intelligence* ("NGI"), *Btu Daily*, and *Natural Gas Week*.

48. The indices were calculated based upon market information, including volume and price information, collected by firms, like Platts, from market participants such as the defendants. Participants in the natural gas markets use these indices to price natural gas purchases and to settle commodity transactions. Further, natural gas purchasers and futures traders refer to the prices published by the reporting firms for price discovery and for assessing price risks. For example, an increase in the prices at a natural gas trading hub signals either stronger demand or weakened supply, and natural gas purchasers and futures traders take account of both price movements and changes in the supply/demand balance when conducting their purchasing and futures trading. In fact, natural gas prices between trading hubs are highly correlated.

49. During the relevant period, defendants engaged in a pervasive and widespread scheme to violate the Kansas Restraint of Trade Act by knowingly delivering by telephone, by facsimile and via the Internet false or misleading or knowingly inaccurate reports concerning trade information, such as certain trades that did not occur and certain actual trades in which the price and/or volume was not reported accurately, that affected the market prices of natural gas, and by manipulating the prices of natural gas by knowingly delivering false or misleading or knowingly inaccurate information about purported natural gas trades to reporting firms, such as Plats. Further, defendants CMS Marketing Services & Trading Company, CMS Field Services, Dynegy Marketing & Trade, Reliant Energy Services, Inc., and Williams Energy Marketing & Trading have publicly admitted making wash trades and often bought and sold many times their needs in quick trading bursts which significantly increased the prices of natural gas in that market. Both wash trades and churning activities by defendants affected or tended to affect the market prices of natural gas.

50. During the relevant period, a substantial number of the purported natural gas trades defendants' knowingly delivered to *IFERC* for the defendants' trading desks *(e.g.*, the Gulf Desk, the Mid-Continent Desk, and the Northeast Desk) were false or misleading or knowingly inaccurate. Further, defendants knowingly delivered hundreds of trades to *Gas Daily*, *NGI*, *Btu Daily*, and *Natural Gas Week* during the relevant period for their trading desks and a substantial number of those

natural gas trades were false or misleading or knowingly inaccurate.

51. Defendants knowingly delivered false or misleading or knowingly inaccurate information concerning trades that did not occur, submitted actual trades with altered volumes and/or prices, and/or failed to submit other actual trades all in an attempt to skew the price indices and thus, the price of natural gas.

52. During the relevant period, defendants knowingly delivered false or misleading or knowingly inaccurate market information and omitted true information from the reports they sent to firms, such as Platts, to manipulate the natural gas price indices in physical and futures marketplaces to financially benefit defendants' trading positions.

53. Defendants' conspiracy directly affected prices for natural gas, including their own or their affiliate's production, traded and sold in the United States and in the State of Kansas. The anticompetitive effect of defendants' illegal arrangements, contracts, agreements, combination and conspiracy was to distort and artificially inflate the prices that plaintiffs paid for natural gas.

54. During the relevant period, the prices of natural gas sold to plaintiff and other class members in the State of Kansas increased as a result of the defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy.

55. Defendants ONEOK Inc. and ONEOK Energy Marketing and Trading Company, L.P. each paid $3 Million civil penalties in October, 2002 to the United States Commodity Futures Trading Commission to settle charges of false reporting of natural gas prices. Defendants The Williams Companies and Williams Energy Marketing and Trading Company, Inc. paid $20 Million in civil penalties in July, 2003 to the United States Commodity Futures Trading Commission to settle charges of attempting to manipulate natural gas price indices. Defendants American Electric Power Company and AEP Energy Services, Inc. paid $30 Million in civil penalties in January 2005 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, and AEP Energy Services, Inc. paid $30 Million in civil penalties in January 2005 to the United States Department of Justice. Defendants Duke Energy Corporation and Duke Energy Trading and Marketing Company, L.L.C. paid $28 Million in civil penalties in September, 2003 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendant Dynegy Marketing & Trade and West Coast Power L.L.C. paid $5 Million in civil penalties in December, 2002 to the United States Commodity Futures Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendants El Paso Corporation and El Paso Merchant Energy, L.P. paid $20 Million in civil penalties in March, 2003 to the United States

Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendants CMS Energy Corporation, CMS Marketing, Services & Trading Company and CMS Field Services paid $16 Million in civil penalties in November, 2003 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendants Reliant Energy and Reliant Energy Services, Inc. paid $18 Million in civil penalties in November, 2003 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, including charges of wash sales. Defendant Coral Energy Resources, L.P. paid $30 Million in civil penalties in July, 2004 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

56. Defendant E prime Inc. paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and intentional manipulation of natural gas prices.

57. Defendants' illegal conduct within the United States was intended to have, and did have a direct, substantial, and reasonably foreseeable effect upon business and commerce in the United States and in the State of Kansas. In particular, as a reasonably foreseeable result of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, prices paid for natural

gas by plaintiffs in the State of Kansas were distorted and artificially inflated.

CLASS ACTION ALLEGATIONS

58. This action is brought as a class action, pursuant to the Federal Rules of Civil Procedure, on behalf of a class of all persons and entities in Kansas defined as follows:

> All industrial and commercial direct purchasers of natural gas for their own use or consumption during the Relevant Time Period, and which gas was used or consumed by them in Kansas. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) defendants and their predecessors, affiliates and subsidiaries; and (d) the federal government and its agencies.

59. Plaintiffs do not know the exact size of the class. However, based upon the nature of the trade and commerce involved, plaintiffs believe that the total number of class members is in the thousands, and that class members are geographically dispersed throughout the State of Kansas. Therefore, joinder of all members of the class is not practicable.

60. Plaintiffs' claims are typical of those to be asserted by the class. Except as to the amount of damages that each class member has sustained, all

other questions of law and fact are common to the class, including but not limited to the following:

(a) Whether the defendants and their co-conspirators conspired and agreed among themselves to increase, advance or control natural gas price indices to financially benefit defendants' businesses;

(b) The duration and extent of the defendants' combination and conspiracy;

(c) Whether the defendants took steps to actively conceal their conspiracy;

(d) Whether the defendants' conduct violated Kansas Statutes Annotated § 50-101, et seq.; and

(e) Whether the defendants' conduct affected natural gas prices and caused injury to the business or property of plaintiffs and other members of the class and, if so, the amount of their damages.

61. Plaintiffs, as representatives of the class, will fairly and adequately protect the interests of the class and have engaged counsel experienced and competent in litigation of this type. The interests of plaintiffs are coincident with, and not antagonistic to, those of the other members of the class.

62. The questions of law and fact common to members of the class predominate over any questions affecting only individual members of the class. Class action treatment is a superior method

for the fair and efficient adjudication of the controversy in that, among other things, there is no interest by members of the class in individually controlling the prosecution of separate actions and it is desirable to concentrate the litigation of the claims made herein in a single proceeding in order to provide relatively small claimants with a forum in which to seek redress for this antitrust violation. Whatever difficulties may exist in the management of the class action will be greatly outweighed by the class action procedure, including but not limited to providing claimants with a method for the redress of claims that may not otherwise warrant individual litigation.

63. Moreover, defendants have acted on grounds generally applicable to the entire class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

VIOLATIONS ALLEGED

64. Beginning in January 1, 2000 and continuing through October 31, 2002, the exact dates being unknown to plaintiffs, defendants and their co-conspirators entered into and engaged in illegal arrangements, contracts, agreements, and combination and conspiracy in restraint of trade and commerce as alleged herein. This combination and conspiracy restrained trade and commerce and prevented full and free competition in the United States, including the State of Kansas, in violation of the provisions of Chapter 50, Article 1 -- The Kansas Restraint of Trade Act.

65. The arrangements, contracts, agreements, and combination and conspiracy alleged herein consisted of a continuing agreement, understanding and concert of action among the defendants and their co-conspirators, the substantial terms of which included, but were not limited to, the following:

(a) To agree to arrangements, contracts, agreements, and a combination and conspiracy among themselves made with a view or which tended to prevent full and free competition in the trading and sale of natural gas in the United States, including the State of Kansas;

(b) To agree to arrangements, contracts, agreements, and a combination and conspiracy among themselves which tended to increase, advance, manipulate, or control the market prices of natural gas in the United States, including the State of Kansas;

(c) To agree to arrangements, contracts, agreements, and a combination and conspiracy among themselves which tended to increase, advance, manipulate, or control the market prices of natural gas by agreeing to send to reporting firms, such as Platts, false and nonexistent trades and trade information for such natural gas in the United States, including the State of Kansas; and

(d) To affirmatively conceal the existence of their illegal understanding and agreement.

66. For the purpose of forming and effectuating the aforesaid arrangements, contracts, agreements, and combination and conspiracy, the defendants and their co-conspirators -- including, in particular, officers and employees of defendants' affiliates -- participated in secret e-mails, telephone conversations and agreements in the United States in which misleading trade information, prices and price increases for natural gas as well as methods to conceal defendants' unlawful agreements were discussed and agreed upon.

EFFECTS

67. The defendants' aforesaid arrangements, contracts, agreements, and combination and conspiracy which were made with a view or which tended to prevent full and free competition, or to increase, advance, manipulate, or control the market prices of natural gas have had the following effects on plaintiffs, among others:

(a) Prices charged to plaintiffs for natural gas were increased, advanced, manipulated, and controlled at artificially high and non-competitive levels;

(b) Full and free competition in the market for natural gas in the United States, including the State of Kansas, was prevented, controlled, and restrained;

(c) The artificially inflated market prices for natural gas were passed on to plaintiffs;

(d) Plaintiffs have been deprived of the benefit of full and free competition and were damaged in their property or business by having paid more for natural gas than they would have paid in the absence of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy; and

(e) Plaintiffs have been deprived of the right to make risk management, resource allocation and other financial decisions in a full and free competitive market for natural gas.

FRAUDULENT CONCEALMENT

68. Plaintiffs had no knowledge that the defendants and their co-conspirators were violating the provisions of Chapter 50, Article 1 — The Kansas Restraint of Trade Act as alleged herein, or of any facts which might have led to the discovery thereof until shortly before filing their initial Petition For Damages. Plaintiffs only learned that defendants and their co-conspirators may have violated the provisions of Chapter 50, Article I — The Kansas Restraint of Trade Act, shortly before filing their initial Petition For Damages. Plaintiffs could not have discovered any of the violations at an earlier time prior to this date by the exercise of due diligence because of the deceptive practices and techniques of secrecy employed by defendants and their co-conspirators to avoid detection of and

fraudulently to conceal such violations. Moreover, plaintiffs were not aware of defendants' activities of reporting false trade information and prices for natural gas due to the false statements and misrepresentations by defendants and their co-conspirators that their prices for natural gas were very competitive and independently determined. Plaintiffs had no actual or imputed knowledge of defendants and their co-conspirators' contract, combination and conspiracy until shortly before filing their initial Petition for Damages.

69. At all relevant times, defendants and their co-conspirators affirmatively concealed the existence of their illegal arrangements, contracts, agreements, combination and conspiracy and thereby tolled the statute of limitations. Plaintiffs did not discover and could not have discovered defendants' unlawful conduct at an earlier date by the exercise of due diligence because defendants and their co-conspirators affirmatively and fraudulently concealed the existence of their arrangements, contracts, agreements, combination and conspiracy from plaintiffs by various acts, including the following:

(a) Defendants and their co-conspirators conducted private, secret telephone conversations, e-mails, and discussions in the United States in order to confine knowledge of their unlawful arrangements, contracts, agreements, combination and conspiracy to a discrete group of individuals;

(b) Defendants and their co-conspirators secretly coordinated the day-to-day conduct of the conspiracy, such as decisions regarding prices for natural gas and sending trade information to reporting firms;

(c) Defendants' executives routinely and consistently destroyed records and notes of their unlawful telephone conversations, e-mails, discussions, and agreements to conceal their illegal conduct; and

(d) Defendants and their co-conspirators falsely and fraudulently represented to *IFERC*, *Gas Daily*, and others that their prices and volumes for natural gas were honest, competitive, and independently determined.

DAMAGES

70. During the relevant period of the antitrust violations by defendants and their co-conspirators, plaintiffs purchased natural gas, and by reason of the violations alleged herein, paid more for natural gas than they would have paid in the absence of such antitrust violations. As a result, plaintiffs have been injured. Plaintiffs are seeking damages under the full consideration damage remedy of Kansas Statutes Annotated § 50-115 during the relevant time period, January 1, 2000 through October 31, 2002, the exact dates being undetermined at this time. Plaintiffs also are seeking damages under the treble damages remedy of Kansas Statutes

Annotated § 50-161 during the relevant time period, January 1, 2000 through October 31, 2002, the exact dates being undetermined at this time. The amount of damages sustained by plaintiffs is presently undetermined.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

(a) That the Court determine and certify a direct purchaser class under Kansas Rule of Civil Procedure, as defined herein in Paragraph 58 above, determine that plaintiffs are adequate and appropriate representative of the class, and order that reasonable notice of this action be given to other members of the class;

(b) That the alleged arrangements, contracts, agreements, combination and conspiracy between the defendants and their co-conspirators be adjudged and decreed to be in violation of Kansas Statutes Annotated § 50-101 and § 50-112;

(c) That defendants, their successors, their assignees, their subsidiaries and transferees, and their respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the

previously alleged arrangements, contracts, agreements, combination and conspiracy, understanding or concert of action, and from adopting or following any practice, plan, program or design having a similar purpose or effect in restraining competition in the State of Kansas in the pricing of natural gas;

(d) That a judgment be entered against defendants and in favor of plaintiffs for the full consideration of their purchases of natural gas which plaintiffs purchased during the relevant time period, January 1, 2000 through October 31, 2002, pursuant to Kansas Statutes Annotated § 50-115;

(e) In the alternative, that a judgment be entered against defendants and in favor of plaintiffs for treble the damages sustained when plaintiffs purchased natural gas during the relevant time period, January 1, 2000 through October 31, 2002, pursuant to Kansas Statutes Annotated § 50-161.

(f) That plaintiffs be awarded the necessary costs of bringing suit, including reasonable attorney fees under Kansas Statutes Annotated § 50-108 and § 50-161; and

(g) That plaintiffs be awarded such other and further relief as this Court may deem necessary and appropriate.

JURY DEMAND

Plaintiffs hereby demand trial by jury on all issues so triable.

Dated: November 17, 2009

Respectfully submitted,

/s/ Jennifer Gille Bacon
R. LAWRENCE WARD KS Fed #17343
JENNIFER GILLE BACON KS #23129
GREGORY M. BENTZ KS #23128
POLSINELLI SHUGHART P.C.
Twelve Wyandotte Plaza
120 W 12th Street, Ste. 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Telecopier: (816) 374-0509

GREG L. MUSIL KS #13398
POLSINELLI SHUGHART P.C.
6201 College Blvd., Suite 500
Overland Park, Kansas 66211
Telephone: 913-451-8788
Fax: 913-451-6205

Donald D. Barry KS #6250
Barry Law Offices, LLC
Donald D. Barry, Chartered
5340 S.W. 17th Street
P.O. Box 4816
Topeka, Kansas 66604
Telephone: (785) 273-3151
Telecopier: (785) 273-5115

Gary D. McCallister KS #08928
Gary D. McCallister & Associates, Ltd.
29 LaSalle Street, Suite 1210
Chicago, IL 66063
Telephone: (312) 345-0611
Telecopier: (312) 345-0612

Eric I. Unrein KS #16042
Davis, Unrein, Biggs & Head, L.L.P.
100 E. 9th Street, 3rd Floor
P.O. Box 3575
Topeka, KS 66601-3575
Telephone: 785-354-1100
Fax: 785-354-1113

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2009, a true and correct copy of the foregoing was electronically filed and served on counsel for all parties properly registered to receive notice via the Court's CM/ECF system.

/s/ Jennifer Gille Bacon

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL Docket No. 1566

IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION.

Base Case File No.
CV-S-03-1431-PMP (PAL)

THIS DOCUMENT RELATES TO:

Case No. CV-S-07-987-PMP (PAL)

HEARTLAND REGIONAL MEDICAL CENTER,
PRIME TANNING CORP.,
NORTHWEST MISSOURI STATE UNIVERSITY,
and All Other Similarly Situated Direct
Purchasers of Natural Gas for Their Own
Use or Consumption in Missouri,

Plaintiffs,

v.

ONEOK INC.,
ONEOK ENERGY MARKETING AND
TRADING COMPANY, L.P.,
KANSAS GAS MARKETING CO.,
THE WILLIAMS COMPANIES, INC.,

WILLIAMS MERCHANT SERVICES
COMPANY, INC.,
WILLIAMS ENERGY MARKETING & TRADING,
AMERICAN ELECTRIC POWER COMPANY,
AEP ENERGY SERVICES, INC.,
DUKE ENERGY CORPORATION,
DUKE ENERGY TRADING AND
MARKETING COMPANY, L.L.C.,
DYNEGY MARKETING & TRADE,
EL PASO CORPORATION,
EL PASO MERCHANT ENERGY, L.P.,
CMS ENERGY CORPORATION,
CMS MARKETING SERVICES &
TRADING COMPANY,
CMS FIELD SERVICES,
RELIANT ENERGY, INC.,
RELIANT ENERGY SERVICES, INC.,
CORAL ENERGY RESOURCES, L.P.,
XCEL ENERGY, INC. and
E PRIME INC.,

Defendants.

CLASS ACTION

JURY TRIAL DEMANDED

AMENDED COMPLAINT FOR DAMAGES

Plaintiffs, Heartland Regional Medical Center ("Heartland Regional"), Prime Tanning Corp., and Northwest Missouri State University ("NMSU"), on behalf of themselves and all others similarly situated, by and through their attorneys, bring this action for damages under the Missouri Antitrust Law, R.S.Mo. § 416.010 *et seq.*, and allege as follows:

JURISDICTION AND DAMAGES

1. Plaintiffs bring this Amended Complaint For Damages pursuant to the Missouri Antitrust Law, R.S.Mo. § 416.010 *et seq.* to obtain damages and injunctive and other equitable relief which plaintiffs and other members of the class have sustained due to violations of these statutes by defendants.

2. Venue is proper in the Western District of Missouri for purposes of trial. The action was originally filed in Buchanan County, Missouri, pursuant to R.S.Mo. § 416.131 because one or more of the defendants maintains an office, transacts business, has an agent or is found in Buchanan County, Missouri. Many of the unlawful acts done pursuant to the arrangements, contracts, agreements, combination and conspiracy alleged herein, had a direct and substantial effect on plaintiffs and other members of the class within Missouri, and within Buchanan County. The trade and commerce hereinafter described is carried on, in part, within Missouri, including Buchanan County. Defendants, directly and through affiliates they dominate and control, performed unlawful acts in furtherance of their illegal arrangements, contracts,

agreements, combination and conspiracy within Missouri and the United States that were intended to have, and did have, a direct and substantial and reasonably foreseeable effect on plaintiffs and other members of the class in Missouri and Buchanan County. Personal jurisdiction exists over all defendants, in part, based upon the activities of their corporate affiliates, upon certain defendants' registration as foreign corporations doing business in Missouri and their role in a conspiracy that they reasonably could expect to affect commerce and harm purchasers in Missouri.

3. Defendants removed this action from the Circuit Court of Buchanan County, Missouri to the United States District Court for the Western District of Missouri pursuant to the Class Action Fairness Act, 28 U.S.C. § 1711 et seq. The Judicial Panel on Multidistrict Litigation then transferred this action from the Western District of Missouri to the District of Nevada for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. At an appropriate time, Plaintiffs intend to seek remand to the United States District Court for the Western District of Missouri.

PLAINTIFFS

4. Plaintiff, Heartland Regional, is a not-for-profit Missouri company with its principal place of business in St. Joseph, Missouri. Heartland purchased natural gas for use at its facilities located in Missouri directly from one or more of the defendants, and from other sellers of natural gas in Missouri, during the Relevant Time Period ("January 1, 2000 through October 31, 2002").

Plaintiff's purchases of natural gas during the Relevant Time Period were affected by the defendants' manipulations.

5. Plaintiff, Prime Tanning Corp., is a Missouri corporation with its principal place of business in St. Joseph, Missouri. Prime Tanning Corp. purchased natural gas for use at its facilities located in Missouri directly from one or more of the defendants, and from other sellers of natural gas in Missouri, during the Relevant Time Period. Plaintiff's purchases of natural gas during the Relevant Time Period were affected by the defendants' manipulations.

6. Plaintiff, NMSU, is a publicly-funded university with its principal location in Maryville, Missouri. NMSU purchased natural gas for use at its facilities located in Missouri directly from one or more of the defendants, and from other sellers of natural gas in Missouri, during the Relevant Time Period. Plaintiff's purchases of natural gas during the Relevant Time Period were affected by the defendants' manipulations.

DEFENDANTS

7. Defendant ONEOK Inc. is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. ONEOK Inc., wholly controls and dominates ONEOK Energy Marketing and Trading Company, L.P., and other affiliates or divisions that regularly conduct business in Missouri. ONEOK Inc. buys, sells, transports, and stores natural gas, including its own and its

affiliates' production, in the United States and in Missouri.

8. Defendant ONEOK Inc. directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. ONEOK Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officer(s) and/or director(s), including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.' s officer(s) or director(s), including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to

reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as ONEOK Energy Marketing and Trading Company, L.P., in the United States and in Missouri.

9. Personal jurisdiction exists over ONEOK Inc. based upon the activities of its corporate affiliates, in particular ONEOK Energy Marketing and Trading Company, L.P., that traded and sold natural gas in the United States and in Missouri during the Relevant Time Period. ONEOK, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri through their marketing efforts and materials. As more fully described in Paragraph 56 below, in October, 2002, ONEOK, Inc. and ONEOK Energy Marketing and Trading, L.P., paid $3 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting of natural gas prices.

10. Defendant ONEOK Energy Marketing and Trading Company, L.P., is a Delaware limited partnership in good standing and has its principal place of business in Tulsa, Oklahoma. ONEOK Energy Marketing and Trading Company, L.P., is wholly controlled and dominated by defendant ONEOK, Inc. concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful

arrangements, contracts, agreements, combination and conspiracy, officer(s) and/or director(s) of ONEOK, Inc., including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which ONEOK Energy Marketing and Trading Company, L.P. sold in Missouri and elsewhere. ONEOK Energy Marketing and Trading Company, LP., buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Missouri.

11. Defendant Kansas Gas Marketing Company is a Kansas corporation with its principal place of business in Tulsa, Oklahoma. Defendant Kansas Gas Marketing Company is wholly controlled and dominated by defendant ONEOK, Inc. concerning both the conduct of its policies and business practices generally and in particular its conduct in furtherance of the Defendant's unlawful arrangements, contracts, agreements, combination, conspiracy, and fraud alleged herein. Kansas Gas Marketing Company sold natural gas in Missouri, transacted substantial business in Missouri, made contracts in Missouri, and/or committed tortious acts that had actionable consequences within the State of Missouri.

12. Defendant The Williams Companies, Inc. is a Delaware corporation in good standing and has its

principal place of business in Tulsa, Oklahoma. The Williams Companies, Inc. wholly controls and dominates Williams Energy Marketing & Trading, Williams Merchant Services Company, Inc. and other affiliates or divisions that regularly conduct business in Missouri. The Williams Companies, Inc. through its affiliates, buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Missouri.

13. Defendant The Williams Companies, Inc. directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. The Williams Companies, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officer(s) and/or director(s), such as William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Missouri. During the Relevant Time Period and in furtherance

of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officer(s) or director(s), such as William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Williams Energy Marketing & Trading and Williams Merchant Services Company, Inc. in the United States and in Missouri.

14. Personal jurisdiction exists over The Williams Companies, Inc. based upon the activities of its corporate affiliates, in particular Williams Merchant Services Company, Inc. and Williams Energy Marketing & Trading, that traded and sold natural gas in the United States and in Missouri during the Relevant Time Period. The Williams Companies, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri through their marketing efforts and materials. William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, is "Senior Officer" of The Williams Companies, Inc. As more fully described in Paragraph 56 below, The Williams Companies, Inc. and Williams Energy Marketing & Trading Company paid $20 Million, in civil penalties in July, 2003 to the United States Commodity Futures Trading Commission to settle charges of attempting

to manipulate natural gas price indices. On December 17, 2004, a former trader of Williams Energy Marketing & Trading Company, Thomas J. Pool, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms from mid-1998 through mid-2002 for the purpose of manipulating monthly price indices of natural gas at Southern California Gas, El Paso Natural Gas in the San Juan Basin, and Colorado Interstate Gas in the Rockies. Mr. Pool admitted creating fictitious natural gas trades at the behest of his supervisor. On May 20, 2005, a former trader of Williams Energy Marketing & Trading Company, Brion Scott McKenna, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms, *Inside FERC's Gas Market Report* and *NGI's Bidweek Survey*, from September, 2000 to June 30, 2002 for the purpose of manipulating published index prices of natural gas in the West Coast, East Coast, Gulf Coast and Rocky Mountain regions of the United States. Mr. McKenna admitted in his Plea Agreement to successfully manipulating the index prices of natural gas on February 1, 2001 at the following locations: Columbia Gas Transmission Corp. at Appalachia; Florida Gas Transmission Co. pipeline at Zones 2 and 3; Natural Gas Pipeline Co. of America pipeline at Louisiana; Transcontinental Gas Pipeline Corp. at Zone 2; and Transco Zone 6 Market Center. Mr. McKenna admitted in his Plea Agreement that by reporting false trades, he intended to influence the price published by *Inside FERC* and *NGI* at each location for which he reported, and to the extent that his false trade information was included in the

respective index calculations, the published index prices did not reflect the legitimate forces of supply and demand. Mr. Thomas Pool, another Williams trader, has admitted as part of his plea agreement that he was trained and directed by his supervisors to undertake and cover-up the manipulation of natural gas prices.

15. Defendant Williams Merchant Services Company, Inc. ("Williams Services"), is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. is wholly controlled and dominated by its parent company, The Williams Companies, Inc. a Delaware corporation with headquarters in Tulsa, Oklahoma. Williams Merchant Services Company, Inc., wholly controls and dominates Williams Energy Marketing & Trading. Williams Merchant Services Company, Inc. is wholly controlled and dominated by The Williams Companies, Inc., concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and director(s) of The Williams Companies, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices

that affected the market prices of natural gas which Williams Merchant Services Company, Inc. or its affiliate Williams Energy Marketing & Trading sold in Missouri and elsewhere. Williams Merchant Services Company, Inc. buys, sells, stores and transports natural gas, including its own or its affiliates' production, in the United States and in Missouri.

16. Defendant Williams Energy Marketing & Trading is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Defendant Williams Energy Marketing & Trading is wholly controlled and dominated by Williams Merchant Services Company, Inc., which in turn is wholly controlled and dominated by its parent, defendant The Williams Companies, Inc. Defendant Williams Energy Marketing & Trading is wholly controlled and dominated by defendants, Williams Merchant Services Company, Inc. and The Williams Companies, Inc., concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and director(s) of The Williams Companies, Inc. and Williams Merchant Services Company, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Energy Marketing & Trading, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for

use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Energy Marketing & Trading sold in Missouri and elsewhere. Defendant Williams Energy Marketing & Trading buys, sells, and transports natural gas, including its own or its affiliates' production, in the United States and in Missouri.

17. Defendant American Electric Power Company is a New York corporation in good standing and has its principal place of business in Columbus, Ohio. The American Electric Company wholly controlled and dominated during the Relevant Time Period its subsidiary AEP Energy Services, Inc., an Ohio corporation with its principal place of business in Columbus, Ohio. Defendant American Electric Power Company buys, sells, transports electricity and natural gas, including its own and its affiliates' production, in the United States and in Missouri.

18. Defendant American Electric Power Company, directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. American Electric Power Company's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and

combination and conspiracy, American Electric Power Company's officer(s) and/or director(s) agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officer(s) or director(s), made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as AEP Energy Services, Inc.

19. Personal jurisdiction exists over American Electric Power Company based upon the activities of its corporate affiliates, in particular AEP Energy Services, Inc., that sold natural gas in the United States and in Missouri during the Relevant Time Period. American Electric Power Company and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri through their marketing efforts and materials.

20. Defendant AEP Energy Services, Inc. is an Ohio corporation in good standing and has its principal place of business in Columbus, Ohio. AEP

Energy Services, Inc. is wholly controlled and dominated by its parent, American Electric Power Company, an Ohio corporation with headquarters in Columbus, Ohio. AEP Energy Services, Inc. is wholly controlled and dominated by defendant American Electric Power Company concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officer(s) and director(s) of American Electric Power Company, Inc. made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which AEP Energy Services, Inc. sold. AEP Energy Services, Inc. bought, sold and transported natural gas during the Relevant Time Period, including its own or its affiliates' production, in the United States and in Missouri. As more fully described in Paragraph 56 below, in January 2005, American Electric Power Company and AEP Energy Services, Inc. paid $30 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. AEP Energy Services, Inc. also paid $30 Million in civil penalties to the United States Department of Justice while acknowledging and accepting responsibility for submitting knowingly inaccurate trade information for its Gulf Natural Gas Trading Desk, and for two

other trading desks covering the Northeast and Mid-Continent regions.

21. Defendant Duke Energy Corporation is a North Carolina corporation with its principal place of business in Charlotte, North Carolina. Duke Energy Corporation wholly controls and dominates its subsidiary, Duke Energy Trading and Marketing Company, L.L.C., a Delaware limited liability corporation with its principal place of business in Houston, Texas. Duke Energy Corporation wholly controls and dominates Duke Energy Trading and Marketing Company, L.L.C., and other affiliates that regularly conduct business in Missouri.

22. Defendant Duke Energy Corporation directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Duke Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officer(s) and/or director(s) agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition or which tended to advance or control the market prices of natural gas that its affiliates sold in the United

States and in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officer(s) or director(s) made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Duke Energy Trading and Marketing Company, L.L.C., in the United States and in Missouri.

23. Personal jurisdiction exists over Duke Energy Corporation based upon the activities of its corporate affiliates, in particular Duke Energy Trading and Marketing, L.L.C., that traded and sold natural gas in the United States and in Missouri during the Relevant Time Period. Duke Energy Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri, through their marketing efforts and materials. As more fully described in Paragraph 56 below, in September, 2003, Duke Energy Corporation and Duke Energy Trading and Marketing, L.L.C. paid $28 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

24. Defendant Duke Energy Trading and Marketing Company, L.L.C. is a Delaware limited liability corporation registered as a foreign

corporation in Missouri, with its principal place of business in Houston, Texas. Duke Energy Trading and Marketing Company, L.L.C. is wholly controlled and dominated by its parent, Duke Energy Corporation, a Delaware corporation with its principal place of business in Charlotte, North Carolina. Duke Energy Trading and Marketing Company, L.L.C. is wholly controlled and dominated by defendant Duke Energy Corporation concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and director(s) of Duke Energy Corporation made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Duke Energy Trading and Marketing Company, L.L.C. sold in Missouri and elsewhere. On or about February 1, 2005, the Commodity Futures Trading Commission filed a civil action in the United States District Court for the Southern District of Texas, against Michael Whitney, a former energy trader of Duke Energy Trading and Marketing Company, alleging that Whitney submitted or caused to be submitted false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, concerning natural gas transactions which he executed between June,

2001 and August, 2002. Duke Energy Trading and Marketing Company, L.L.C. buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Missouri.

25. Defendant Dynegy Marketing & Trade is a Colorado general partnership in good standing with its principal place of business in Houston, Texas. Dynegy Marketing & Trade is wholly controlled and dominated by its general partners, DMT Holdings, L.P. and Dynegy GP Inc. Dynegy Marketing & Trade was one of the largest natural gas marketers in the United States and in 2001, Dynegy Marketing & Trade's natural gas sales averaged 8.2 billion cubic feet per day. Dynegy Marketing & Trade regularly conduct business in Missouri.

26. Defendant Dynegy Marketing & Trade made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Dynegy Marketing & Trade's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officer(s) and/or director(s), such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, agreed to

arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officer(s) or director(s), such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Dynegy Marketing & Trade sold in Missouri and elsewhere, and those policies and decisions were implemented on an operational level by Dynegy Marketing & Trade's employees in the United States and in Missouri. On September 25, 2002, Dynegy announced it had discovered that 15 of its employees had engaged in reporting false data to price compilers. Of those, seven were fired, four were given the opportunity to resign, and four were otherwise disciplined by the company. As more fully described in Paragraph 56 below, in December, 2002, Dynegy Marketing & Trade and West Coast Power LLC, paid $5 Million in civil penalties to the United States Commodity Future Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

27. Defendant El Paso Corporation is a Delaware corporation in good standing with its principal place of business in Houston, Texas. El Paso Corporation wholly controls and dominates its subsidiary, El Paso Merchant Energy, L.P., a Delaware limited partnership with its principal place of business in Houston, Texas. El Paso Corporation buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Missouri.

28. Defendant El Paso Corporation directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. El Paso Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officer(s) and/or director(s), such as Ralph Eads, Executive Vice President of El Paso, agreed to arrangements, contracts, agreements, and to a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts,

agreements, and combination and conspiracy, El Paso Corporation's officer(s) or director(s), such as Ralph Eads, Executive Vice President, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as El Paso Merchant Energy, L.P., in the United States and in Missouri.

29. Personal jurisdiction exists over El Paso Corporation based upon the activities of its corporate affiliates, in particular El Paso Merchant Energy, L.P., that traded and sold natural gas in the United States and in Missouri during the Relevant Time Period. El Paso Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri through their marketing efforts and materials. As more fully described in Paragraph 56 below, in March, 2003, El Paso Corporation and El Paso Merchant Energy, L.P., paid $20 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. In November, 2004, three former natural gas traders of El Paso Merchant Energy, L.P., Donald E. Burwell, James P. Phillips, and Greg Singleton, were charged by the United States Department of Justice, U.S. Attorney's Office for the Southern District of Texas, with indictments of conspiracy, false reporting, and wire fraud related to the transmission of allegedly inaccurate trade reports to industry

price compilers which used the reported trades to calculate the index price of natural gas. El Paso trader Todd Gelger was sentenced to two years in federal prison following his conviction for reporting false information related to natural gas trades.

30. Defendant El Paso Merchant Energy, L.P. is a Delaware limited partnership with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly controlled and dominated by its parent company, El Paso Corporation, a Delaware corporation with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly controlled and dominated by defendant El Paso Corporation concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officer(s) and/or director(s) of El Paso Corporation, such as Ralph Eads, Executive Vice President of El Paso Corporation and President of El Paso's Merchant Energy Group, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which El Paso Merchant Energy, LP. sold in Missouri and elsewhere. El Paso Merchant Energy, L.P. buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Missouri.

31. Defendant CMS Energy Corporation is a Michigan corporation in good standing with its principal place of business in Jackson, Michigan. CMS Energy Corporation wholly controlled and dominated during the Relevant Time Period its subsidiary CMS Marketing Services & Trading Company, a Michigan corporation with its principal place of business in Houston, Texas. CMS Energy Corporation wholly controlled and dominated during the Relevant Time Period CMS Field Services, a Michigan corporation with its principal place of business in Tulsa, Oklahoma. CMS Energy Corporation wholly controlled and dominated CMS Marketing Services & Trading Company, CMS Field Services, and other affiliates or divisions that regularly conducted business in Missouri during the Relevant Time Period.

32. Defendant CMS Energy Corporation, directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. CMS Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, CMS Energy Corporation's officer(s) and/or director(s), such as Victor J. Fryling, President and Chief Operating Officer, agreed to

arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, CMS Energy Corporation's officer(s) or director(s), such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as CMS Marketing Services & Trading Company and CMS Field Services, in the United States and in Missouri.

33. Personal jurisdiction exists over CMS Energy Corporation based upon the activities of its corporate affiliates, in particular CMS Marketing, Services & Trading Company and CMS Field Services, that traded and sold natural gas in the United States and in Missouri during the Relevant Time Period. CMS Energy Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri through their marketing efforts and materials. As more fully described in Paragraph 56 below, in November, 2003, CMS Energy Corporation, CMS Marketing, Services & Trading Company, and CMS

Field Services paid $16 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

34. Defendant CMS Marketing Services & Trading Company was a Michigan corporation registered as a foreign corporation in good standing in Missouri during the Relevant Time Period with its principal place of business in Houston, Texas. CMS Marketing Services & Trading Company was wholly controlled and dominated during the Relevant Time Period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS Marketing Services & Trading Company was wholly controlled and dominated by defendant CMS Energy Corporation concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officer(s) and/or director(s) of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Marketing Services & Trading Company sold. CMS Marketing Services & Trading Company bought, sold and transported natural gas, including its own or its

affiliates' production, during the Relevant Time Period in the United States and in Missouri.

35. Defendant CMS Field Services was a Michigan corporation in good standing during the Relevant Time Period with its principal place of business in Tulsa, Oklahoma. CMS Field Services was wholly controlled and dominated during the Relevant Time Period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS Field Services changed its name after the Relevant Time Period to CMS Continental Natural Gas, Inc., and later to Cantera Gas Company. CMS Field Services was wholly controlled and dominated by defendant CMS Energy Corporation concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officer(s) and/or director(s) of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Field Services and CMS Marketing Services & Trading Company sold. On or about February 1, 2005, the Commodity Futures Trading Commission filed a civil action in United States District Court for the Northern District of

Oklahoma, against Jeffrey A. Bradley and Robert L. Martin, former traders of CMS Field Services, alleging that they conspired to submit false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, between January, 2001 and October, 2002. In one telephone conversation between Bradley and Martin these men "openly discussed a plan to 'make up some numbers and turn them into the reporting firms.'" CMS Field Services bought, sold, stored, and transported natural gas, including its own or its affiliates' production, during the Relevant Time Period in the United States and in Missouri.

36. Defendant Reliant Energy, Inc. is a Delaware corporation in good standing with it principal place of business in Houston, Texas. In April, 2004, Reliant Energy, Inc. officially changed its name from Reliant Resources, Inc. Reliant Resources, Inc. wholly controlled and dominated its subsidiary Reliant Energy Services, Inc. during the Relevant Time Period, a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc., buys, sells, and transports natural gas in the United States and in Missouri.

37. Defendant Reliant Energy, Inc., f/k/a Reliant Resources, Inc., directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended

to advance or control the market prices of natural gas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s officer(s) and/or director(s), such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.' s officer(s) or director(s), such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as Reliant Energy Services, Inc.

38. Personal jurisdiction exists over Reliant Energy, Inc., f/k/a Reliant Resources, Inc. based upon the activities of its corporate affiliates, in particular Reliant Energy Services, Inc., that traded and sold natural gas in the United States and in Missouri during the Relevant Time Period. Reliant Energy, Inc., f/k/a Reliant Resources, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri through their marketing efforts and materials.

39. Defendant Reliant Energy Services, Inc. is a Delaware corporation registered as a foreign corporation in good standing in Missouri during the Relevant Time Period with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly controlled and dominated during the Relevant Time Period by its parent, Reliant Energy, Inc., f/k/a Reliant Resources, Inc., a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly controlled and dominated by defendant Reliant Resources, Inc. concerning both the conduct of it business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. Reliant Energy Services, Inc. buys, sells, and transports natural gas in the United States and in Missouri. As more fully described in Paragraph 56 below, in November, 2003, Reliant Energy Services, Inc. paid a $18 Million civil penalty to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted

manipulation of natural gas prices, including charges of wash sales. In November, 2004, a former natural gas trader of Reliant Energy Services, Inc., Jerry A. Futch, was charged by the United States Department of Justice, U.S. Attorney's Office in the Southern District of Texas, in an indictment for reporting false trades to industry price compilers which used the reported trades to calculate *Inside FERC*'s index price of natural gas.

40. Defendant Coral Energy Resources, L.P. is a Delaware limited partnership in good standing with its principal place of business in Houston, Texas. Coral Energy Resources, L.P. is wholly controlled and dominated by Coral Energy Holdings, L.P., and is an affiliate of Shell Oil Company. Coral Energy Resources, L.P. was one of the largest natural gas marketers in the United States and conducted natural gas marketing operations at eastern and western power and natural gas trading hubs for the Eastern and Western United States during the Relevant Time Period. Coral Energy Resources sells 100% of its parent companies natural gas production. Coral Energy Resources, L.P. regularly conducts business in Missouri.

41. Defendant Coral Energy Resources, L.P. made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Coral Energy Resources, L.P.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on

United States commerce and on commerce in Missouri during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officer(s), director(s) and/or employee(s) agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officer(s), director(s), and/or employee(s) made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Coral Energy Resources, L.P. sold in Missouri and elsewhere, and those policies and decisions were implemented on an operational level by Coral Energy Resources, L.P.'s employees in the United States and in Missouri. As more fully described in Paragraph 56 below, in July, 2004, Coral Energy Resources, L.P. paid $30 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

42. Defendant Xcel Energy, Inc., is a Minnesota corporation in good standing with its principal place of business in Minneapolis, Minnesota. Xcel Energy,

Inc., wholly controlled and dominated during the Relevant Time Period its subsidiary, E prime Inc., a Colorado corporation with its principal place of business in Denver, Colorado. Xcel Energy, Inc., and its affiliates or divisions engaged in energy marketing and trading, and transportation, storage, and marketing of natural gas that regularly conducted business in Missouri during the Relevant Time Period.

43. Defendant Xcel Energy, Inc., directly and through affiliates it dominates and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Xcel Energy, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on United States commerce and on commerce in Missouri, during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officer(s) and/or director(s), agreed to arrangements, contracts, agreements, and a combination and conspiracy which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in Missouri. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officer(s) or director(s), made strategic marketing

policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as E prime Inc., in the United States and in Missouri.

44. Personal jurisdiction exists over Xcel Energy, Inc., based upon the activities of its corporate affiliates, in particular E prime Inc., that traded and sold natural gas in the United States and in Missouri during the Relevant Time Period. Xcel Energy, Inc., and its affiliates consistently have presented a common corporate image to customers in the United States and in Missouri through their marketing efforts and materials.

45. Defendant E prime Inc. is a Colorado corporation in good standing with its principal place of business in Denver, Colorado. E prime Inc. is wholly controlled and dominated by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. E prime Inc. is wholly controlled and dominated by defendant Xcel Energy, Inc., concerning both the conduct of its business generally within Missouri and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officer(s) and/or director(s) of Excel Energy, Inc., made strategic marketing policies and decisions concerning natural

gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which E prime Inc. sold in Missouri and elsewhere. E prime Inc. provided during the Relevant Time Period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States and in Missouri. As more fully described in Paragraph 56 below, in January, 2004, Xcel Energy, Inc., and E prime Inc., paid $16 Million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

46. The unlawful activities of the alleged unlawful arrangements, contracts, agreements, combination and conspiracy set forth in this Amended Complaint For Damages have been committed by defendants and were ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of defendants' business or affairs. Various other persons, entities, companies and corporations not named as defendants, including some whose identities are presently unknown, participated as co-conspirators with defendants in the violations alleged herein and have made statements and performed acts in furtherance of those violations in the United States and elsewhere that had a direct, substantial, and reasonably foreseeable effect on United States commerce and on commerce in Missouri. The co-conspirators include,

but are not limited to, Enron Energy Services, Inc.; Enron Power Marketing, Inc.; Calpine Energy Services, L.P. which paid a $1.5 Million civil penalty (January, 2004) to the CFTC; Cinergy Marketing & Trading, LP which paid a $3 Million civil penalty (November, 2004) to the CFTC; WD Energy Services Inc., f/k/a EnCana Energy Services, Inc., which paid a $20 Million civil penalty (July, 2003) to the CFTC; Enserco Energy, Inc., which paid a $3 Million civil penalty (July, 2003) to the CFTC; Entergy Koch Trading, L.P., which paid a $3 Million civil penalty (January, 2004) to the CFTC; Mirant, which paid a $12.5 Million civil penalty (December, 2004) to the CFTC; NRG Energy, Inc.; Sempra Energy, including affiliate Sempra Energy Trading, and their respective officers, directors, and employees.

NATURE OF THIS ACTION

47. Defendants and their co-conspirators during the Relevant Time Period (at least January 1, 2000 through October 31, 2002) marketed natural gas, including their own or their affiliates' production, to plaintiffs and other customers in Missouri, and throughout the United States in a multi-billion dollar industry. The natural gas purchased by plaintiffs during the Relevant Time Period was deregulated pursuant to various statutory provisions. (*see*, The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301(21) (1994) (first sales are defined in § 2(21)); Section 601(a)(1)(C) of the NGPA, as amended by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60 (no FERC jurisdiction over first sales); The Energy Policy Act of 1992, 15 U.S. Code § 3431 and pursuant to Federal

Energy Regulatory Commission Order No. 547, 61 FERC 61281 (November 30, 1992), Order No. 636, 57 FERC 30939 (April 8, 1992), and Order No. 636-A, 57 FERC 36128 (August 12, 1992).

48. Reporting firms compiled and published indices of natural gas prices for natural gas trading hubs throughout the United States during the Relevant Time Period. These reporting firms divided the natural gas traders into groups, referred to as Desks. Some of the Desks corresponded with geographic regions of the United States: the Gulf Coast, the West, the Northwest, the Northeast, and the Mid-continent Desks. Missouri was included in the Mid-continent Desk. The price compilers used prices and volume information in calculating indices of natural gas prices for various hubs throughout the United States. The price compilers include Platts, a division of The McGraw-Hill Companies, which issues a monthly index for various natural gas hubs entitled *Inside FERC Gas Market Report* ("IFERC"), and a daily index for various natural gas hubs entitled Gas Daily. Other price indices which received false trade information included *National Gas Intelligence* ("NGI"), *Btu Daily*, *Gas Daily* and *Natural Gas Week*.

49. The indices were calculated based upon market information, including volume and price information, collected by firms, like Platts, from market participants such as the defendants. Participants in the natural gas markets use these indices to price natural gas purchases and to settle commodity transactions. Further, natural gas purchasers and futures traders refer to the prices

published by the reporting firms for price discovery and for assessing price risks. For example, an increase in the prices at a natural gas trading hub signals either stronger demand or weakened supply, and natural gas purchasers and futures traders take account of both price movements and changes in the supply/demand balance when conducting their purchasing and futures trading. In fact, natural gas prices between trading hubs are highly correlated.

50. During the Relevant Time Period, defendants engaged in a pervasive and widespread scheme to violate the Missouri Antitrust Law by knowingly delivering by telephone, by facsimile and via the Internet false or misleading or knowingly inaccurate reports concerning trade information, such as certain trades that did not occur and certain actual trades in which the price and/or volume was not reported accurately, that affected the market prices of natural gas, and by manipulating the prices of natural gas by knowingly delivering false or misleading or knowingly inaccurate information about purported natural gas trades to reporting firms, such as Platts. Further, defendants CMS Marketing Services & Trading Company, CMS Field Services, Dynegy Marketing & Trade, Reliant Energy Services, Inc., and Williams Energy Marketing & Trading have publicly admitted making wash trades and often bought and sold many times their needs in quick trading bursts which significantly increased the prices of natural gas in that market. Both wash trades and churning activities by defendants affected or tended to affect the market prices of natural gas.

51. During the Relevant Time Period, a substantial number of the purported natural gas trades defendants' knowingly delivered to *IFERC* for the defendants' trading desks (*e.g.*, the Gulf Desk, the Mid-Continent Desk, and the Northeast Desk) were false or misleading or knowingly inaccurate. Further, defendants knowingly delivered hundreds of trades to *Gas Daily*, *NGI*, *Btu Daily*, and *Natural Gas Week* during the Relevant Time Period for their trading desks and a substantial number of those natural gas trades were false or misleading or knowingly inaccurate.

52. Defendants knowingly delivered false or misleading or knowingly inaccurate information concerning trades that did not occur, submitted actual trades with altered volumes and/or prices, and/or failed to submit other actual trades all in an attempt to skew the price indices and thus, the price of natural gas.

53. During the Relevant Time Period, defendants knowingly delivered false or misleading or knowingly inaccurate market information and omitted true information from the reports they sent to firms, such as Platts, to manipulate the natural gas price indices in physical and futures marketplaces to financially benefit defendants' trading positions.

54. Defendants' conspiracy directly affected prices for natural gas, including their own or their affiliate's production, traded and sold in the United States and in Missouri. The anticompetitive effect of defendants' illegal arrangements, contracts, agreements, combination and conspiracy was to

distort and artificially inflate the prices that plaintiffs paid for natural gas.

55. During the Relevant Time Period, the prices of natural gas sold to plaintiff and other class members in Missouri increased as a result of the defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy.

56. Defendants ONEOK Inc. and ONEOK Energy Marketing and Trading Company, L.P. paid $3 Million civil penalties in October, 2002 to the United States Commodity Futures Trading Commission to settle charges of false reporting of natural gas prices. Defendants The Williams Companies and Williams Energy Marketing and Trading Company, Inc. paid $20 Million in civil penalties in July, 2003 to the United States Commodity Futures Trading Commission to settle charges of attempting to manipulate natural gas price indices. Defendants American Electric Power Company and AEP Energy Services, Inc. paid $30 Million in civil penalties in January 2005 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, and AEP Energy Services, Inc. paid $30 Million in civil penalties in January 2005 to the United States Department of Justice. Defendants Duke Energy Corporation and Duke Energy Trading and Marketing Company, L.L.C. paid $28 Million in civil penalties in September, 2003 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendant

Dynegy Marketing & Trade and West Coast Power L.L.C. paid $5 Million in civil penalties in December, 2002 to the United States Commodity Futures Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendants El Paso Corporation and El Paso Merchant Energy, L.P. paid $20 Million in civil penalties in March, 2003 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendants CMS Energy Corporation, CMS Marketing, Services & Trading Company and CMS Field Services paid $16 Million in civil penalties in November, 2003 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendants Reliant Energy and Reliant Energy Services, Inc. paid $18 Million in civil penalties in November, 2003 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, including charges of wash sales. Defendant Coral Energy Resources, L.P. paid $30 Million in civil penalties in July, 2004 to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. Defendant E prime Inc. paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and intentional manipulation of natural gas prices.

57. Defendants' illegal conduct within the United States was intended to have, and did have a direct,

substantial, and reasonably foreseeable effect upon business and commerce in the United States and in Missouri. In particular, as a reasonably foreseeable result of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, prices paid for natural gas by plaintiffs in Missouri were distorted and artificially inflated.

CLASS ACTION ALLEGATIONS

58. This action is brought as a class action, pursuant to Missouri Supreme Court Rule 52.08, on behalf of a class of all persons and entities in Missouri defined as follows:

> Plaintiffs bring this action both on behalf of themselves and on behalf of a class consisting of all industrial and commercial direct purchasers of natural gas for their own use or consumption during the Relevant Time Period, and which gas was used or consumed by them in Missouri. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) defendants and their predecessors, affiliates and subsidiaries; and (d) the federal government and its agencies.

59. Plaintiffs do not know the exact size of the class. However, based upon the nature of the trade and commerce involved, plaintiffs believe that the total number of class members is substantial, and that class members are geographically dispersed

throughout Missouri. Therefore, joinder of all members of the class is not practicable.

60. Plaintiffs' claims are typical of those to be asserted by the class. Except as to the amount of damages that each class member has sustained, all other questions of law and fact are common to the class, including but not limited to the following:

(a) Whether the defendants and their co-conspirators conspired and agreed among themselves to increase, advance or control natural gas price indices to financially benefit defendants' businesses;

(b) The duration and extent of the defendants' combination and conspiracy;

(c) Whether the defendants took steps to actively conceal their conspiracy;

(d) Whether the defendants' conduct violated Mo. Rev. Stat. § 416.011, et seq.; and

(e) Whether the defendants' conduct affected natural gas prices and caused injury to the business or property of plaintiffs and other members of the class and, if so, the amount of their damages.

61. Plaintiffs, as representatives of the class, will fairly and adequately protect the interests of the class and have engaged counsel experienced and competent in litigation of this type. The interests of plaintiffs are coincident with, and not antagonistic to, those of the other members of the class.

62. The questions of law and fact common to members of the class predominate over any questions affecting only individual members of the class. Class action treatment is a superior method for the fair and efficient adjudication of the controversy in that, among other things, there is no interest by members of the class in individually controlling the prosecution of separate actions and it is desirable to concentrate the litigation of the claims made herein in a single proceeding in order to provide relatively small claimants with a forum in which to seek redress for this antitrust violation. Whatever difficulties may exist in the management of the class action will be greatly outweighed by the class action procedure, including but not limited to providing claimants with a method for the redress of claims that may not otherwise warrant individual litigation.

63. Moreover, defendants have acted on grounds generally applicable to the entire class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

VIOLATIONS ALLEGED

64. Beginning in January 1, 2000 and continuing through October 31, 2002, the exact dates being unknown to plaintiffs, defendants and their co-conspirators entered into and engaged in illegal arrangements, contracts, agreements, and combination and conspiracy in restraint of trade and commerce as alleged herein. This combination and conspiracy restrained trade and commerce and prevented full and free competition in the United

States, including Missouri, in violation of the Missouri Antitrust Law.

65. The arrangements, contracts, agreements, and combination and conspiracy alleged herein consisted of a continuing agreement, understanding and concert of action among the defendants and their co-conspirators, the substantial terms of which included, but were not limited to, the following:

(a) To agree to arrangements, contracts, agreements, and a combination and conspiracy among themselves made with a view or which tended to prevent full and free competition in the trading and sale of natural gas in the United States, including Missouri;

(b) To agree to arrangements, contracts, agreements, and a combination and conspiracy among themselves which tended to increase, advance, manipulate, or control the market prices of natural gas in the United States, including Missouri;

(c) To agree to arrangements, contracts, agreements, and a combination and conspiracy among themselves which tended to increase, advance, manipulate, or control the market prices of natural gas by agreeing to send to reporting firms, such as Platts, false and nonexistent trades and trade information for such natural gas in the United States, including Missouri; and

(d) To affirmatively conceal the existence of their illegal understanding and agreement.

66. For the purpose of forming and effectuating the aforesaid arrangements, contracts, agreements, and combination and conspiracy, the defendants and their co-conspirators — including, in particular, officers and employees of defendants' affiliates — participated in secret e-mails, telephone conversations and agreements in the United States in which misleading trade information, prices and price increases for natural gas as well as methods to conceal defendants' unlawful agreements were discussed and agreed upon.

EFFECTS

67. The defendants' aforesaid arrangements, contracts, agreements, and combination and conspiracy which were made with a view or which tended to prevent full and free competition, or to increase, advance, manipulate, or control the market prices of natural gas have had the following effects on plaintiffs, among others:

(a) Prices charged to plaintiffs for natural gas were increased, advanced, manipulated, and controlled at artificially high and non-competitive levels;

(b) Full and free competition in the market for natural gas in the United States, including Missouri, was prevented, controlled, and restrained;

(c) The artificially inflated market prices for natural gas were passed on to plaintiffs;

(d) Plaintiffs have been deprived of the benefit of full and free competition and were damaged in their property or business by having paid more for natural gas than they would have paid in the absence of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy; and

(e) Plaintiffs have been deprived of the right to make risk management, resource allocation and other financial decisions in a full and free competitive market for natural gas.

FRAUDULENT CONCEALMENT

68. Plaintiffs had no knowledge that the defendants and their co-conspirators were violating the provisions of the Missouri Antitrust Law as alleged herein, or of any facts which might have led to the discovery thereof. Plaintiffs only learned that defendants and their co-conspirators may have violated the provisions of the Missouri Antitrust Law shortly before filing their Petition For Damages. Plaintiffs could not have discovered any of the violations at an earlier time prior to this date by the exercise of due diligence because of the deceptive practices and techniques of secrecy employed by defendants and their co-conspirators to avoid detection of and fraudulently to conceal such violations. Moreover, plaintiffs were not aware of defendants' activities of reporting false trade information and prices for natural gas due to the false statements and misrepresentations by defendants and their co-conspirators that their prices for natural gas were very competitive and

independently determined. Plaintiffs had no actual or imputed knowledge of defendants and their co-conspirators' contract, combination and conspiracy until shortly before filing their Petition For Damages.

69. At all relevant times, defendants and their co-conspirators affirmatively concealed the existence of their illegal arrangements, contracts, agreements, combination and conspiracy and thereby tolled the statute of limitations. Plaintiffs did not discover and could not have discovered defendants' unlawful conduct at an earlier date by the exercise of due diligence because defendants and their co-conspirators affirmatively and fraudulently concealed the existence of their arrangements, contracts, agreements, combination and conspiracy from plaintiffs by various acts, including the following:

(a) Defendants and their co-conspirators conducted private, secret telephone conversations, e-mails, and discussions in the United States in order to confine knowledge of their unlawful arrangements, contracts, agreements, combination and conspiracy to a discrete group of individuals;

(b) Defendants and their co-conspirators secretly coordinated the day-to-day conduct of the conspiracy, such as decisions regarding prices for natural gas and sending trade information to reporting firms;

(c) Defendants' executives routinely and consistently destroyed records and notes of

their unlawful telephone conversations, e-mails, discussions, and agreements to conceal their illegal conduct; and

(d) Defendants and their co-conspirators falsely and fraudulently represented to *IFERC*, *Gas Daily*, and others that their prices and volumes for natural gas were honest, competitive, and independently determined.

DAMAGES

70. During the Relevant Time Period of the antitrust violations by defendants and their co-conspirators, plaintiffs purchased natural gas, and by reason of the violations alleged herein, paid more for natural gas than they would have paid in the absence of such antitrust violations. As a result, plaintiffs have been injured. Plaintiffs are seeking damages, including treble damages, for their injuries suffered during the Relevant Time Period, the exact dates being undetermined at this time. The amount of damages sustained by plaintiffs is presently undetermined.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

(a) That the Court determine and certify a direct purchaser and user class under the Missouri Supreme Court Rules, determine that plaintiffs are adequate and appropriate representative of the class, and order that reasonable notice of this action be given to other members of the class;

(b) That the alleged arrangements, contracts, agreements, combination and conspiracy between the defendants and their co-conspirators be adjudged and decreed to be in violation of the Missouri Antitrust Law;

(c) That defendants, their successors, their assignees, their subsidiaries and transferees, and their respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the previously alleged arrangements, contracts, agreements, combination and conspiracy, understanding or concert of action, and from adopting or following any practice, plan, program or design having a similar purpose or effect in restraining competition in Missouri in the pricing of natural gas;

(d) That a judgment be entered against defendants and in favor of plaintiffs for damages, including treble damages;

(e) That plaintiffs be awarded the necessary costs of bringing suit, including reasonable attorney fees under R.S.Mo. § 416.121; and

(f) That plaintiffs be awarded such other and further relief as this Court may deem necessary and appropriate.

JURY DEMAND

Plaintiffs hereby demand trial by jury on all issues so triable.

Dated: November 19, 2009

Respectfully submitted,

/s/ Jennifer Gille Bacon
R. LAWRENCE WARD MO #17343
JENNIFER GILLE BACON MO #27432
GREGORY M. BENTZ MO #33369
POLSINELLI SHUGHART P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Telecopier: (816) 374-0509

R. DAN BOULWARE MO #24289
POLSINELLI SHUGHART P.C.
3101 Frederick Avenue
St. Joseph, Missouri 64506
Telephone: (816) 502-3438
Telecopier: (816) 279-3977

DONLAD D. BARRY KS #6250
BARRY LAW OFFICES, LLC
Donald D. Barry, Chartered
5340 S.W. 17th Street
P.O. Box 4816
Topeka, Kansas 66604
Telephone: (785) 273-3151
Telecopier: (785) 273-5115

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2009, a true and correct copy of the foregoing was electronically filed and served on counsel for all parties properly registered to receive notice via the Court's CM/ECF system.

/s/ Jennifer Gille Bacon

No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX — VOLUME 2 OF 2

NEAL KUMAR KATYAL*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

ROBERT L. GEGIOS*
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Rd.
Milwaukee, W.I., 53212
(414) 962-5110
rgegios@kmksc.com

Counsel for Wisconsin Respondents

JENNIFER GILLE BACON*
POLSINELLI PC
900 West 48th Place
Suite 900
Kansas City, M.O. 64112
(816) 753-1000
jbacon@polsinelli.com

Counsel for Learjet Respondents

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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* * *

The appendix to the petition for certiorari contains the following material, which is omitted from the Joint Appendix:

A. Opinion of the United States Court of Appeals for the Ninth Circuit (April 10, 2013) 1a

B. Opinion of the United States District Court for the District of Nevada (July 18, 2011) 64a

C. Opinion of the United States District Court for the District of Nevada (November 2, 2009) 124a

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL Docket No. 1566
Base Case File No. CV-S-03-1431

In re:

WESTERN STATES WHOLESALE
NATURAL GAS
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

Case No.: CV-S-09-0915-PMP (PAL)
W.D. Wis. Case No. 09-C-240-C

NEWPAGE WISCONSIN SYSTEM INC.,

Plaintiff,

v.

CMS ENERGY RESOURCE MANAGEMENT COMPANY (f/k/a CMS Marketing Services and Trading Company),CMS ENERGY CORPORATION (a/k/a CMS Energy), CANTERA GAS COMPANY (f/k/a CMS Field Services, Inc.), XCEL ENERGY INC., NORTHERN STATES POWER COMPANY, CENTERPOINT ENERGY SERVICES, INC. (f/k/a Reliant Energy Retail, Inc.), CORAL ENERGY RESOURCES, L.P.,

DUKE ENERGY TRADING AND MARKETING, L.L.C., DYNEGY ILLINOIS INC. (f/k/a Dynegy, Inc.), DMT G.P. L.L.C. (successor to DMT Holdings, L.P.) (a/k/a Dynegy DMT G.P., L.L.C.), DYNEGY GP INC., DYNEGY MARKETING AND TRADE, E PRIME, INC., EL PASO CORPORATION, EL PASO MARKETING, L.P. (f/k/a El Paso Merchant Energy, L.P.),ONEOK ENERGY SERVICES COMPANY, L.P. (f/k/a Oneok Energy Marketing and Trading Company, L.P.), ONEOK, INC., RELIANT ENERGY SERVICES, INC., THE WILLIAMS COMPANIES, INC., WILLIAMS POWERCOMPANY, INC. (f/k/a Williams Energy Marketing & Trading), And WILLIAMS MERCHANT SERVICES COMPANY, INC.,

Defendants.

AMENDED CLASS ACTION COMPLAINT

The plaintiff, NewPage Wisconsin System Inc. (hereinafter "NewPage"), on behalf of itself and all others similarly situated, by its attorneys, for its amended complaint pursuant to the Court's Order dated June 4, 2010, alleges as follows:

1. This is a class action pursuant to the Wisconsin Antitrust Act (Wis. Stat. ch. 133), brought by NewPage on behalf of itself and of a class consisting of all industrial and commercial direct purchasers of natural gas for their own use or consumption between January 1, 2000, and October 31, 2002 (the "Relevant Time Period"), and which gas

was used or consumed by them in Wisconsin. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) entities that purchased natural gas from entities that sold natural gas at rates approved by the Wisconsin Public Service Commission (to the extent of such purchases at such approved rates); (d) defendants and their predecessors, affiliates and subsidiaries; and (e) the federal government and its agencies.

NATURAL GAS AND WISCONSIN COMMERCE

2. Each year, Wisconsin consumes over 350,000,000 thousand cubic feet (Mcf) of natural gas. That translates (depending on the price) to an expense to the Wisconsin economy of between 1.75 and 3.5 billion dollars per year, in a state that has a total gross domestic product (total value of goods and services produced in the state) of only 215 billion dollars per year. During the Relevant Time Period, Wisconsin consumed over one billion Mcf of natural gas.

3. Natural gas plays a primary role in the Wisconsin economy, as it is used as a heating fuel for many buildings, generates a substantial percentage of the electricity consumed, and is the primary energy source for many industries (including such major Wisconsin industries as the metal working, food processing, brewing and dairy processing industries). As then President Bush said in a speech given in Appleton, Wisconsin, in 2004, "[n]atural gas

is absolutely vital for many manufacturers in Wisconsin."

4. Wisconsin produces no natural gas. All natural gas consumed in Wisconsin is produced elsewhere. Additionally, most companies that trade in natural gas, including trading natural gas that is consumed in Wisconsin, do not have their principal places of business or trading desks located in Wisconsin. Because of this, a conspiracy relating to natural gas prices has a greater impact on Wisconsin commerce than such a conspiracy would have on commerce in many other states. A conspiracy to manipulate natural gas prices, while economically benefiting the economies of some other states—such as Texas, Oklahoma and other states where producers and traders of natural gas tend to concentrate—has only negative consequences in Wisconsin.

5. The price manipulation conspiracy engaged in by the defendants during the Relevant Time Period had a profoundly negative impact on commercial entities in Wisconsin. For example, according to the Energy Information Agency, the city gate price for natural gas in Wisconsin increased from a price of $2.94 Mcf in January 2000, to a price of $9.92 Mcf in January 2001. The average monthly price for natural gas commercial consumers in Wisconsin (including institutional consumers but not industrial consumers) increased from $5.03 per Mcf in January 2000, to $11.05 per Mcf in January 2001. On information and belief, this was a historically unprecedented change in prices, which cannot be explained by a shortage of natural gas, or an

increase in demand for natural gas. According to the Energy Information Agency, this change in prices resulted in the average annual price for commercial consumers increasing from a price per Mcf of $4.84 in 1999, to $6.32 in 2000, and then to $7.55 in 2001. Because of this, Wisconsin commercial consumers paid over one hundred million dollars more for natural gas in just 2001 compared to 2000. The conspiracy engaged in by the defendants also increased price volatility in the natural gas market, which caused commercial entities in Wisconsin to incur greater expenses associated with hedging natural gas costs. The conspiracy injured Wisconsin commercial entities in Wisconsin, including NewPage, by, among other things, depriving them of the right and ability to make risk management, resource allocation and other financial decisions relating to natural gas, in a full and free competitive market.

OVERVIEW OF CAUSES OF ACTION

6. NewPage alleges in this case two causes of action, the first under Wis. Stat. § 133.14 (Wisconsin's "Full Consideration Antitrust Statute") and the second under Wis. Stat. § 133.18 (Wisconsin's "Treble Damages Antitrust Statute").

7. Under the first cause of action, NewPage seeks a declaratory judgment that certain natural gas contracts and agreements made during the Relevant Time Period are void pursuant to Wis. Stat. § 133.14. The grounds for such a ruling are that during the Relevant Time Period the defendants were members of a conspiracy prohibited by Wis. Stat. § 133.03. Specifically, the defendants are

sellers of natural gas, and during the Relevant Time Period each of them conspired to restrain trade or commerce relating to natural gas. As such, the contracts or agreements that relate to Wisconsin for the sale of natural gas that were made by the defendants while in the conspiracy—which contracts or agreements were founded upon, were the result of, grew out of or were connected with the conspiracy, either directly or indirectly—are void pursuant to Wis. Stat. § 133.14. The plaintiff requests that the Court formally declare those contracts or agreements void pursuant to Wis. Stat. § 806.04, Wisconsin's Uniform Declaratory Judgment Act.

8. Wis. Stat. § 133.14 further provides that because the defendants were members of a conspiracy prohibited by Wis. Stat. § 133.03, none of them may recover on, or benefit from, any such void contract. Furthermore, under the second sentence of Wis. Stat. § 133.14, the plaintiff and the class members it sues on behalf of are entitled to recover from the defendants the payments they made for natural gas during the Relevant Time Period, to the full extent that the defendants benefited from those payments. Wis. Stat. § 133.03 and § 133.14 are remedial, punitive statutes, which were created by the Wisconsin legislature to deter companies from engaging in price collusion, so as to protect the free market system. The legislature wanted to deter price collusion so that the benefits of free market lower prices—which benefits can and should flow to the public—are not denied by unlawful collusion. Because the defendants violated Wis. Stat. § 133.03 and because those agreements are void under Wis. Stat. § 133.14, plaintiff and the class members it

sues on behalf of are entitled to recover from the defendants in this action the full amount of the payments the plaintiff and class members made for natural gas during the Relevant Time Period, to the full extent the defendants benefited from those payments.

9. Under the second separate and independent cause of action, the plaintiff alleges that the defendants violated Wis. Stat. § 133.03. Specifically, the defendants are sellers of natural gas, and during the Relevant Time Period, the defendants violated Wis. Stat. § 133.03 by conspiring to restrain trade or commerce relating to natural gas. The plaintiff and the class members it sues on behalf of were injured by such conduct. As such, NewPage and the class are entitled pursuant to Wis. Stat. § 133.18 to recover three times the damages they sustained from the defendants, reduced after trebling by any payments actually recovered by them through their claim under Wis. Stat. § 133.14.

10. Although the federal government, through the Federal Energy Regulatory Commission, regulates a small portion of sales of natural gas in the United States, NewPage herein does not seek to recover damages for any sales the price of which is set via a regulatory procedure by the Federal Energy Regulatory Commission. The natural gas transactions that are the subject of this case were deregulated pursuant to various statutory provisions (see, The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301(21) (1994) (first sales are defined in § 2(21)); Section 601(a)(1)(C) of the NGPA, as amended by the Natural Gas Wellhead Decontrol Act

of 1989, Pub. L. No. 101-60) (no FERC jurisdiction over first sales); The Energy Policy Act of 1992, 15 U.S. Code § 3431 and pursuant to Federal Energy Regulatory Commission Order No. 547, 61 FERC 61281 (November 30, 1992), Order No. 636, 57 FERC 30939 (April 8, 1992, and Order No 636-A, 57 FERC 36128 (August 12, 1992)).

PLAINTIFF

11. Plaintiff NewPage Wisconsin System Inc. (f/k/a Stora Enso North America Corp. and Stora Enso Consolidated Papers, Inc. and successor by merger to Consolidated Papers, Inc.) (hereinafter "NewPage"), is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office located in Miamisburg, Ohio, and its principal Wisconsin office located at 510 High Street, Wisconsin Rapids, Wisconsin 54495.

12. NewPage is a manufacturer of coated paper and other paper products which, during the Relevant Time Period, owned and operated paper mills in Wisconsin Rapids, Biron, Stevens Point, Niagara, Kimberly and Whiting, Wisconsin. It also owned and operated during the Relevant Time Period the Mead Hotel in Wisconsin Rapids, Wisconsin. NewPage is, on information and belief, one of the largest users of natural gas in the state of Wisconsin, each year purchasing several million dollars worth of natural gas for its operations. During the Relevant Time Period, NewPage purchased natural gas from defendant CMS Energy Resource Management Company (f/k/a CMS Marketing Services and Trading Company). NewPage also had an agency relationship with Kaztex Energy Management

("Kaztex"). During the Relevant Time Period, Kaztex purchased on NewPage's behalf natural gas directly from a number of defendants in this case, on information and belief, including, but not necessarily limited to, Coral Energy Resources, LP, Duke Energy Trading and Marketing, LLC, Dynegy Marketing & Trade, El Paso Marketing, L.P., Oneok Energy Services Company, LP, and CMS Energy Resource Management Company.

DEFENDANTS AND CO-CONSPIRATORS

A. The ONEOK Defendants: ONEOK Inc. and ONEOK Energy Marketing and Trading Company, L.P.

13. Defendant ONEOK Inc. is a Delaware corporation which has its principal place of business in Tulsa, Oklahoma. ONEOK Inc. wholly owns defendant ONEOK Energy Marketing and Trading Company, L.P., and other affiliates or divisions that regularly sold natural gas consumed in Wisconsin, and to Wisconsin businesses. On information and belief, grounds exist for disregarding the corporate fiction between ONEOK Inc. and its subsidiary ONEOK Energy Marketing and Trading Company, L.P. based on such cases as *Weibke v. Richardson & Sons, Inc.*, 83 Wis. 2d 359, 363, 265 N.W.2d 571(1978); *Consumer's Co-op. of Walworth County v. Olsen*, 142 Wis. 2d 465, 476, 419 N.W.2d 211 (1988); *Cemetery Services, Inc. v. Wisconsin Dept. of Regulation and Licensing*, 221 Wis. 2d 817, 827, 586 N.W.2d 191 (Ct. App. 1998); and *Conservatorship of Prom v. Sumitomo Rubber Industries, Ltd.*, 224 Wis. 2d 743, 760-61, 592 N.W.2d 657 (Ct. App. 1999). ONEOK Inc. buys, sells, transports, and

stores natural gas, including its own and its affiliates' production, in the United States and in Wisconsin.

14. Defendant ONEOK Inc., directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. ONEOK Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period ONEOK either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officers or directors, including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officers or directors,

including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as ONEOK Energy Marketing and Trading Company, L.P., in the United States and in Wisconsin.

15. Personal jurisdiction exists over ONEOK Inc. based upon the activities of its corporate affiliates, in particular ONEOK Energy Marketing and Trading Company, L.P., that traded and sold natural gas in the United States and to Wisconsin-based companies during the Relevant Time Period. ONEOK, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials. In October, 2002, ONEOK, Inc. and ONEOK Energy Marketing and Trading, L.P., paid $3 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting of natural gas prices during the time period from at least July 2000 to October 2002.

16. Defendant ONEOK Energy Marketing and Trading Company, L.P., is a Delaware limited partnership in good standing and has its principal place of business in Tulsa, Oklahoma. ONEOK Energy Marketing and Trading Company, L.P., is

wholly owned and controlled by defendant ONEOK, Inc. concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy, one or more officers or directors of ONEOK, Inc., including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which ONEOK Energy Marketing and Trading Company, L.P. sold in Wisconsin and elsewhere. ONEOK Energy Marketing and Trading Company, LP., buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

B. **The Williams Defendants: The Williams Companies, Inc., Williams Power Company, Inc. (f/n/a Williams Energy Marketing & Trading) and Williams Merchant Services Company, Inc.**

17. Defendant The Williams Companies, Inc. is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. The Williams Companies, Inc. wholly owns and controls Williams Power Company, Inc., Williams Merchant

Services Company, Inc. and other affiliates or divisions that regularly sold natural gas consumed in Wisconsin, and to Wisconsin businesses. On information and belief, grounds exist for disregarding the corporate fiction between The Williams Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom*. The Williams Companies, Inc. through its affiliates, buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

18. Defendant The Williams Companies, Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. On information and belief, during the Relevant Time Period, The Williams Companies, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. The Williams Companies, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officers or directors, such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., agreed to arrangements, contracts, agreements, and a

combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officers or directors, such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Williams Power Company, Inc. and Williams Merchant Services Company, Inc. in the United States and in Wisconsin.

19. Personal jurisdiction exists over The Williams Companies, Inc. based upon the activities of its corporate affiliates, in particular Williams Merchant Services Company, Inc. and Williams Power Company, Inc., that traded and sold natural gas in the United States and to Wisconsin companies during the Relevant Time Period. The Williams Companies, Inc. and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials. William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., is "Senior Officer" of The Williams Companies, Inc. The Williams Companies,

Inc. and Williams Power Company, Inc. Company paid $20 million in civil penalties in July, 2003 to the United States Commodity Futures Trading Commission to settle charges of attempting to manipulate natural gas price indices. On December 17, 2004, a former trader of Williams Energy Marketing & Trading Company, Thomas J. Pool, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms from mid-1998 through mid-2002 for the purpose of manipulating monthly price indices of natural gas. As part of his plea agreement, he admitted that he had the ability to influence the market price of natural gas in interstate commerce, that the published index price of natural gas was artificial in that it did not reflect the legitimate forces of supply and demand, that his conduct was the cause of the artificial price, and that he intended to cause the artificial price. Mr. Pool admitted that most of the trades he reported while an employee of Williams were deliberately fabricated. Mr. Pool admitted creating fictitious natural gas trades at the behest of his supervisor.

20. On May 20, 2005, another former trader of Williams Energy Marketing & Trading Company, Brion Scott McKenna, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms, *Inside FERC's Gas Market Report* and *NGI's Bidweek Survey*, from September, 2000 to June 30, 2002 for the purpose of manipulating published index prices of natural gas in the West Coast, East Coast, Gulf Coast and Rocky Mountain regions of the United States. Mr. McKenna admitted in his Plea Agreement to

successfully manipulating the index prices of natural gas on February 1, 2001 at the following locations: Columbia Gas Transmission Corp. at Appalachia; Florida Gas Transmission Co. pipeline at Zones 2 and 3; Natural Gas Pipeline Co. of America pipeline at Louisiana; Transcontinental Gas Pipeline Corp. at Zone 2; and Transco Zone 6 Market Center. Mr. McKenna admitted in his Plea Agreement that by reporting false trades, he intended to influence the price published by *Inside FERC* and *NGI* at each location for which he reported, and to the extent that his false trade information was included in the respective index calculations, the published index prices did not reflect the legitimate forces of supply and demand. Mr. McKenna admitted that most of the trades he reported were deliberately fabricated, and that he would routinely circulate a spreadsheet containing fictitious trades for input from other traders. Mr. Thomas Pool, another Williams trader, has admitted as part of his plea agreement that he was trained and directed by his supervisors to undertake and cover-up the manipulation of natural gas prices. In February 2006, Williams Power Company, Inc. agreed to pay $50 million to the Justice Department to settle claims relating to its artificially jacking up natural gas prices in 2000 and 2001. In its agreement with the Justice Department, Williams Power Company, Inc. acknowledged responsibility for the actions of its former employees in its energy trading operation. In 2006 Williams Power Company, Inc. also agreed to pay $290 million to resolve a class action lawsuit alleging that the company improperly booked millions of dollars in profits for its energy marketing and trading division

during the Relevant Time Period. In 2006 Williams Power Company, Inc.'s former trader and operations manager Daryl Brown pleaded guilty in connection with a scheme to manipulate prices. Brown pleaded guilty to one count of manipulation of the price of a commodity in interstate commerce in violation of the Commodity Exchange Act, admitting that throughout the Relevant Time Period he conspired to report false trades to Platts' *Inside FERC's Gas Market Report* and to NGI's *Bidweek Survey* in order to affect published indexes.

21. Defendant Williams Merchant Services Company, Inc., is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. is wholly owned and controlled by its parent company, The Williams Companies, Inc. a Delaware corporation with headquarters in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. wholly owns and controls Williams Power Company, Inc. Williams Merchant Services Company, Inc. is wholly owned and controlled by The Williams Companies, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of The Williams Companies, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing

policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Merchant Services Company, Inc. or its affiliate Williams Power Company, Inc. sold in Wisconsin and elsewhere. Williams Merchant Services Company, Inc. buys, sells, stores and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

22. Defendant Williams Power Company, Inc. (f/k/a Williams Energy Marketing & Trading) is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Defendant Williams Power Company, Inc. is wholly owned and controlled by Williams Merchant Services Company, Inc., which in turn is wholly owned and controlled by its parent, defendant The Williams Companies, Inc. Defendant Williams Power Company, Inc. is wholly owned and controlled by defendants, Williams Merchant Services Company, Inc. and The Williams Companies, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, officers and directors of The Williams Companies, Inc. and Williams Merchant Services Company, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc.,

made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Power Company, Inc. sold in Wisconsin and elsewhere. Defendant Williams Power Company, Inc. buys, sells, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

C. The AEP Co-Conspirators: American Electric Power Company and AEP Energy Services, Inc.

23. Co-conspirator American Electric Power Company is a New York corporation in good standing and has its principal place of business in Columbus, Ohio. American Electric Power Company wholly owned and controlled during the Relevant Time Period its subsidiary AEP Energy Services, Inc., an Ohio corporation with its principal place of business in Columbus, Ohio. On information and belief, grounds exist for disregarding the corporate fiction between the AEP co-conspirators based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom*. American Electric Power Company buys, sells and transports electricity and natural gas, including its own and its affiliates' production, in the United States and in Wisconsin.

24. Co-conspirator American Electric Power Company, directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and

conspiracy between the defendants and their co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. On information and belief, during the Relevant Time Period, American Electric Power Company, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. American Electric Power Company's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officers or directors agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Wisconsin. During the Relevant Time Period and in furtherance of defendants' and their co-conspirators' unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officers or directors, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an

operational level by affiliates, such as AEP Energy Services, Inc. According to a FERC Report, American Electric Power Company and AEP Energy Services, Inc. traders were instructed by their superiors to adjust the prices and volumes of trades they had made and, in some cases, to report trades that never occurred, because it was common practice in the industry.

25. American Electric Power Company through its corporate affiliates, in particular AEP Energy Services, Inc., sold natural gas in the United States and in Wisconsin during the Relevant Time Period. AEP Energy Services, Inc. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. American Electric Power Company, and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials.

26. Co-conspirator AEP Energy Services, Inc. is an Ohio corporation in good standing and has its principal place of business in Columbus, Ohio. AEP Energy Services, Inc. is wholly owned and controlled by its parent, American Electric Power Company, an Ohio corporation with headquarters in Columbus, Ohio. AEP Energy Services, Inc. is wholly owned and controlled by co-conspirator American Electric Power Company concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants'

and their co-conspirators' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' and their co-conspirators' unlawful agreements, one or more officers or directors of American Electric Power Company, Inc. made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which AEP Energy Services, Inc. sold. AEP Energy Services, Inc. bought, sold and transported natural gas during the Relevant Time Period, including its own or its affiliates' production, in the United States and in Wisconsin. In September 2005, the CFTC filed a civil action against Joseph Foley, a former trader employed by American Electric Power Company and AEP Energy Services, Inc. The complaint alleges that from November 2000 through September 2002, Foley engaged in a pervasive and widespread scheme involving his directing those he supervised to deliver to market index publishers false reports concerning natural gas trades. As part of Foley's scheme, at one of the trading desks owned by either American Electrical Power Company or its affiliate AEP Energy Services, Inc., the traders maintained electronic spreadsheets entitled "IFERC Bogus" and "Joe Mama" to record false trades. American Electrical Power Company or AEP Energy Services, Inc. rewarded Foley for the funds he brought into the companies based on his reporting false trades, awarding him over $2 million in bonus compensation in 2002. In January 2005, American Electric Power

Company and AEP Energy Services, Inc. paid $30 million in civil penalties to the CFTC to settle charges of false reporting and attempted manipulation of natural gas prices. AEP Energy Services, Inc. also paid $30 million in civil penalties to the United States Department of Justice while acknowledging and accepting responsibility for submitting knowingly inaccurate trade information for its Gulf Natural Gas Trading Desk, and for two other trading desks covering the Northeast and Mid-Continent regions.

27. AEP Energy Services, Inc. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.

28. Co-conspirator American Electric Power Company, Inc. is liable for the debts and obligations of its wholly owned subsidiary AEP Energy Services, Inc. Throughout the Relevant Time Period, American Electric Power Company, Inc. was aware of the illegal behavior being engaged in by its subsidiary, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding hundreds of millions of dollars in profits from its subsidiary to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on October 10, 2002, American Electric Power Company, Inc.'s Chairman, President and CEO E. Linn Draper announced "a significant down sizing of our trading and marketing operations" (*i.e.*, AEP

Energy Services, Inc.). On information and belief, the way in which the subsidiary was created and capitalized, and the parent company's moves discontinuing operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when American Electric Power Company, Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

D. The Duke Defendants and Co-Conspirators: Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) and Duke Energy Trading and Marketing Company, L.L.C.

29. Co-conspirator Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) is a North Carolina corporation with its principal place of business in Charlotte, North Carolina. During all relevant times Duke Energy Corporation wholly owned and controlled its subsidiary, Duke Energy Trading and Marketing Company, L.L.C., a Delaware limited liability corporation with its principal place of business in Houston, Texas. On information and belief, grounds exist for disregarding the corporate fiction between the Duke Defendants and co-conspirators based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* Duke Energy Corporation wholly owned and controlled Duke Energy Trading and Marketing Company, L.L.C., and other affiliates that regularly sold natural gas consumed in Wisconsin, and to Wisconsin businesses.

30. Co-conspirator Duke Energy Corporation directly and through affiliates it dominated and

controlled, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants and their co-conspirators' which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Duke Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Duke Energy Corporation, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officers or directors agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' and their co-conspirators' unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officers or directors made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies

and decisions were implemented on an operational level by affiliates, such as Duke Energy Trading and Marketing Company, L.L.C., in the United States and in Wisconsin.

31. Duke Energy Carolinas, LLC, Corporation through the activities of its corporate affiliates, in particular Duke Energy Trading and Marketing, L.L.C., traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. Duke Energy Corporation and/or its affiliate Duke Energy Trading and Marketing, L.L.C., entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. Duke Energy Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin, through their marketing efforts and materials. In September, 2003, Duke Energy Corporation and Duke Energy Trading and Marketing, L.L.C. paid $28 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

32. Defendant Duke Energy Trading and Marketing Company, L.L.C. is a Delaware limited liability corporation registered as a foreign corporation in Wisconsin, with its principal place of business in Houston, Texas. Duke Energy Trading and Marketing Company, L.L.C. is wholly owned and controlled by its parent, Duke Energy Corporation, a Delaware corporation with its

principal place of business in Charlotte, North Carolina. Duke Energy Trading and Marketing Company, L.L.C. marketed natural gas to customers across North America. Duke Energy Trading and Marketing Company, L.L.C. is wholly owned and controlled by co-conspirator Duke Energy Corporation concerning both the conduct of its business relating to the Wisconsin market and in particular its conduct in furtherance of defendants' and their co-conspirators' unlawful arrangements, contracts, agreements, and combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' and their co-conspirators' unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of Duke Energy Corporation made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Duke Energy Trading and Marketing Company, L.L.C. sold in Wisconsin and elsewhere. In February 2005, the Commodity Futures Trading Commission filed a civil action in the United States District Court for the Southern District of Texas, against Michael Whitney, a former energy trader of Duke Energy Trading and Marketing Company, alleging that Whitney submitted or caused to be submitted false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, concerning natural gas transactions which he executed between June, 2001 and August, 2002. Duke Energy Trading and Marketing

Company, L.L.C. buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

33. In February 2005, pursuant to a grand jury investigation, the United States indicted former Duke executives Timothy Kramer and Todd Reid on 20 counts of conspiracy, circumvention of controls and falsification of books, wire fraud, violation of honest services act, and mail fraud relating to natural gas trades occurring during the Relevant Time Period. Timothy Kramer was Vice President of Financial Portfolio Management for Duke Energy and an officer of Duke Energy Trading and Marketing Company, L.L.C., and several other Duke Energy subsidiaries. Todd Reid was Senior Vice President of Duke Energy Trading and Marketing Company, L.L.C., and also an officer of several other subsidiaries of Duke Energy. During the Relevant Time Period, Kramer and Reid engaged in what was known as a "round trip trades" or "sleeve trades," which are pre-arranged transactions involving natural gas contracts whereby there is a simultaneous purchase and sale of natural gas between the same parties, for the same volume and term, at the same price, with no contemplation of the payment of money by either party. For the year 2001, a year in which Kramer and Reid made numerous round trip and sleeve trades, Duke Energy paid bonuses (in cash and in Duke Energy stock) of $5,000,000 to Reid and $4,000,000 to Kramer. The indictment indicates that from March 2001 to August 2002, Kramer and Reid knowingly did combine, conspire and agree with each other and other unknown persons to commit wire fraud, and

that as part of their conspiracy between themselves and other unknown persons they caused the execution of over 500 false round trip natural gas trades. The precise identity of the unknown persons who conspired and agreed with Kramer and Reid is unknown to NewPage, but on information and belief, they are the defendants and the non-defendant co-conspirators named herein. In large part based on Kramer and Reid's actions, Duke Energy's earnings for the last three quarters of 2001 and first quarter of 2002 overstated earnings by approximately $54 million.

34. Co-conspirator Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) is liable for the debts and obligations of its wholly owned subsidiary Duke Energy Trading and Marketing Company, L.L.C. Throughout the Relevant Time Period, Duke Energy Corporation was aware of the illegal behavior being engaged in by its subsidiary, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding hundreds of millions of dollars in profits from its subsidiary to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on April 11, 2003, Duke Energy Corporation's President and CEO Fred Fowler announced the closing of all Duke proprietary trading groups. On information and belief, the way in which the subsidiary was created and capitalized, and the parent company's moves discontinuing operations, and relating to discontinuing operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when Duke Energy Corporation first

became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

E. The Dynegy Defendants: Dynegy Illinois Inc. (f/k/a Dynegy Inc.), Dynegy GP Inc., DMT G.P. L.L.C. (successor to DMT Holdings, L.P.), and Dynegy Marketing & Trade.

35. Defendant Dynegy Illinois Inc. (f/k/a Dynegy Inc.) is an Illinois corporation in good standing with its principal place of business in Houston, Texas. Dynegy Illinois Inc. wholly owns and controls defendant Dynegy Marketing & Trade, a Colorado general partnership in good standing with its principal place of business in Houston, Texas. Dynegy Marketing & Trade is wholly owned and controlled by its general partners, defendants Dynegy GP Inc. and DMT G.P., L.L.C. (successor to DMT Holdings, L.P.). On information and belief, grounds exist for disregarding the corporate fiction between the Dynegy Defendants based on the rules normally relating to partnerships and such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* Dynegy Marketing & Trade was one of the largest natural gas marketers in the United States and in 2001, Dynegy Marketing & Trade's natural gas sales averaged 8.2 billion cubic feet per day. Dynegy Marketing & Trade regularly conducted business in Wisconsin during the Relevant Time Period. Dynegy Marketing & Trade entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.

36. Defendant Dynegy Marketing & Trade made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Dynegy Marketing & Trade's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Dynegy Marketing & Trade, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officers or directors, such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officers or directors, such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, made

strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Dynegy Marketing & Trade sold in Wisconsin and elsewhere, and those policies and decisions were implemented on an operational level by Dynegy Marketing & Trade's employees.

37. On September 25, 2002, Dynegy announced that 15 of its employees had engaged in reporting false data to price compilers. Dynegy Marketing & Trade's employees have stated the manner by which they reported trades to industry publications was similar to the way in which it was done at their previous companies, and that this illegal practice was "common practice in the industry" during the Relevant Time Period.

38. In July 2005, acting on the results of a grand jury investigation, the United States indicted former Dynegy Marketing & Trade natural gas trader Michelle Marie Valencia and former El Paso Corporation trader Greg Singleton, alleging that they—in conspiracy with each other and with other unknown persons—made numerous false reports of natural gas trades to index publishers. The precise identity of the other unknown persons who were involved in the conspiracy are currently unknown to NewPage, but on information and belief, they are the defendants and the non-defendant co-conspirators identified herein. The indictment of Valencia and Singleton indicates that the false information they reported to publications affected and tended to affect

index prices, and thereby the price of natural gas in countless transactions all across the United States, which potentially cost consumers of natural gas great sums of money. As part of the conspiracy alleged in the indictment, Singleton and Valencia discussed what trades they did and did not intend to report to index publications, they agreed to report at least one trade between El Paso and Dynegy that was not real, they agreed not to report one or more natural gas trades between Dynegy and El Paso that were in fact real trades, and they caused other employees of Dynegy and El Paso to report fictitious gas trades to *NGI* and *Inside FERC*. In a second superseding indictment relating to Valencia filed in March 2006, the United States alleged that when Valencia reported false information to *Inside FERC* and *Natural Gas Intelligence* in 2000 and 2001, she affected and tended to affect index prices, and thereby the price of natural gas paid by consumers. In August 2006, Valencia of Dynegy was convicted of seven counts of wire fraud relating to reporting false natural gas trades, and Singleton of El Paso was convicted of a count of wire fraud relating to reporting false natural gas trades.

39. In December, 2002, Dynegy Marketing & Trade and West Coast Power LLC, paid $5 million in civil penalties to the United States Commodity Future Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. The charges included that Dynegy Marketing & Trade and West Coast Power LLC conspired together to report false offsetting trades. By reporting offsetting trades, the companies intended

to make their false trades look more believable to the index publishers.

40. Defendant Dynegy Illinois Inc. (f/k/a Dynegy Inc.) is liable for the debts and obligations of its wholly owned and controlled subsidiaries Dynegy GP Inc., DMT G.P., L.L.C. (successor to DMT Holdings, L.P.) and Dynegy Marketing & Trade. Throughout the Relevant Time Period, Dynegy Illinois Inc. was aware of the illegal behavior being engaged in by its subsidiaries, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding millions of dollars in profits from its subsidiaries to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on October 16, 2002, Dynegy Illinois Inc.'s interim CEO Dan Dienstbier announced that Dynegy Illinois Inc. was abandoning its merchant energy operation. On information and belief, the way in which the subsidiary was created and capitalized, and the moves relating to discontinuing its operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when Dynegy Illinois Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

F. The El Paso Defendants: El Paso Corporation and El Paso Marketing, L.P. (f/k/a El Paso Merchant Energy, L.P.)

41. Defendant El Paso Corporation is a Delaware corporation in good standing with its principal place of business in Houston, Texas. El Paso consistently described itself during the Relevant Time Period as

North America's leading provider of natural gas services. El Paso Corporation wholly owns and controls its subsidiary, El Paso Marketing, L.P. (f/k/a El Paso Merchant Energy, L.P.), a Delaware limited partnership with its principal place of business in Houston, Texas. On information and belief, grounds exist for disregarding the corporate fiction between the El Paso Defendants based on the rules relating to partnerships generally and such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* El Paso Corporation buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

42. Defendant El Paso Corporation, directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. El Paso Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period El Paso Corporation, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officers or directors, such as Ralph Eads, Executive

Vice President of El Paso, agreed to arrangements, contracts, agreements, and to a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officers or directors, such as Ralph Eads, Executive Vice President, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as El Paso Merchant Energy, L.P., in the United States and in Wisconsin.

43. Personal jurisdiction exists over El Paso Corporation based upon the activities of its corporate affiliates, in particular El Paso Merchant Energy, L.P., that traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. El Paso Merchant Energy, L.P. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. El Paso Corporation and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and

materials. In March 2003, El Paso Corporation and El Paso Merchant Energy, L.P., paid $20 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. In November 2004, three former natural gas traders of El Paso Merchant Energy, L.P., Donald E. Burwell, James P. Phillips, and Greg Singleton, were charged by the United States Department of Justice, U.S. Attorney's Office for the Southern District of Texas, based on a grand jury indictment, with conspiracy, false reporting, and wire fraud related to the transmission of allegedly inaccurate trade reports to industry price compilers which used the reported trades to calculate the index price of natural gas. El Paso trader Todd Gelger was sentenced to two years in federal prison following his conviction for reporting false information related to natural gas trades. El Paso trader Donald E. Burwell pled guilty in February 2006, to false reporting of natural gas trades. In the indictment relating to Burwell the grand jury charged that he and other traders with whom he combined, conspired and agreed reported false trading information, which affected index prices, and thereby, the price of natural gas in countless transactions around the country, and potentially cost consumers of natural gas great sums of money.

44. In July 2005, acting on a grand jury investigation, the United States indicted former El Paso Corporation trader Greg Singleton, along with former Dynegy Marketing & Trade natural gas trader Michelle Marie Valencia, alleging that during the Relevant Time Period they engaged in a

conspiracy—with each other and with other unknown persons—to make numerous false reports of natural gas trades to index publishers. The precise identity of the other unknown persons who were involved in the conspiracy are currently unknown to NewPage, but on information and belief, they are the defendants and the non-defendant co-conspirators named below. Their indictment indicates that the false information they reported to publications affected and tended to affect index prices, and thereby the price of natural gas in countless transactions all across the United States, which potentially cost consumers of natural gas great sums of money. As part of the conspiracy alleged in the indictment, they discussed what trades they did and did not intend to report to index publications, they agreed to report at least one trade between El Paso and Dynegy that was not real, they agreed not to report one or more natural gas trades between Dynegy and El Paso that were in fact real trades, and they caused other employees of Dynegy and El Paso to report fictitious gas trades to NGI and Inside FERC. In August 2006, Valencia of Dynegy was convicted of seven counts of wire fraud relating to reporting false natural gas trades, and Singleton of El Paso was convicted of a count of wire fraud relating to reporting false natural gas trades. In December 2003, El Paso trader Todd Geiger, a former vice president of El Paso, pled guilty to reporting 48 fake trades in November 2003 to the publication *Inside FERC*. Geiger admitted in court that he knew the trades were false and that the index was used to price natural gas. In October 2004, four former El Paso Corporation natural gas

traders (Christopher Bakkenist, Donald Guilbault, William Ham and Dallas Dean) each pleaded guilty to making false reports used to calculate the index price of natural gas during the Relevant Time Period.

45. Defendant El Paso Merchant Energy, L.P. is a Delaware limited partnership with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly owned and controlled by its parent company, El Paso Corporation, a Delaware corporation with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly owned and controlled by defendant El Paso Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of El Paso Corporation, such as Ralph Eads, Executive Vice President of El Paso Corporation and President of El Paso's Merchant Energy Group, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which El Paso Merchant Energy, LP. sold in Wisconsin and elsewhere. El Paso Merchant Energy, L.P. buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

G. The CMS Defendants: CMS Energy Resource Management Company (f/k/a CMS Marketing Services and Trading Company); CMS Energy Corporation; and Cantera Gas Company (f/k/a CMS Field Services, Inc.)

46. Defendant CMS Energy Resource Management Company (hereinafter "CMS ERM/MST") is a Michigan corporation with its principal place of business in Jackson, Michigan.

47. During the Relevant Time Period, CMS ERM/MST was wholly owned and controlled by its ultimate parent company, Defendant CMS Energy Corporation. On information and belief, CMS Energy Corporation was directly involved during the Relevant Time Period in the day-to-day natural gas trading operations of its subsidiaries, defendant CMS ERM/MST, and defendant CMS Field Services, Inc. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS ERM/MST sold. On information and belief, grounds exist for disregarding the corporate fiction between CMS ERM/MST, CMS Field Services, Inc., and CMS Energy Corporation. CMS Energy Corporation throughout the Relevant Time Period represented itself as a fully integrated energy company, that—

rather than being a passive holding company—marketed and sold natural gas throughout the United States, including in Wisconsin.

48. CMS ERM/MST marketed, sold and transported natural gas during the Relevant Time Period in Wisconsin. Specifically, CMS ERM/MST contracted with and sold millions of dollars of natural gas to plaintiff NewPage during the Relevant Time Period. CMS ERM/MST knew when it contracted with NewPage during the Relevant Time Period that the natural gas it sold to NewPage would be burned, used or otherwise consumed by NewPage in its paper mills in Wisconsin. CMS ERM/MST entered into a Base Contract for Short-term Sale and Purchase of Natural Gas with NewPage during the Relevant Time Period. Phil Marsalese, an employee of CMS ERM/MST, during the Relevant Time Period regularly contacted NewPage employees at NewPage's office in Wisconsin Rapids, Wisconsin—including NewPage employees Thomas Riemer and Wayne Krolikowski—regarding NewPage's purchasing natural gas from CMS ERM/MST, for use at NewPage's facilities in Wisconsin Rapids, Wisconsin.

49. During the Relevant Time Period, CMS ERM/MST targeted the Wisconsin market (and specific large users of natural gas in Wisconsin, including NewPage) and CMS ERM/MST's marketing personnel traveled to and marketed gas in Wisconsin (including to NewPage, Wisconsin Gas Company, Wisconsin Electric Power Company, Wisconsin Public Service Corporation and WPS Energy Services). CMS ERM/MST purposely

directed its marketing activities and its sales efforts at particular Wisconsin gas consumers (including NewPage). During the Relevant Time Period, CMS ERM/MST also sold millions of dollars of natural gas to subsidiaries of Wisconsin Energy Corporation (Wisconsin Gas Company and Wisconsin Electric Power Company), by far the largest purchasers of natural gas in the state of Wisconsin, and knew during that time that practically all of that gas it sold to those companies was consumed in Wisconsin. CMS ERM/MST knew during that time that practically all of that gas it sold to Wisconsin Gas Company and Wisconsin Electric Power Company (a/k/a "WEPCO") was consumed in Wisconsin because CMS ERM/MST knew Wisconsin was the service territory served by those two companies. During the Relevant Time Period CMS ERM/MST had an evergreen gas supply agreement with WEPCO. CMS ERM/MST gas marketing personnel—including such CMS ERM/MST employees as Ann Burke, Steve Husband, George Hass and Gary Skarb—travelled to Wisconsin and met directly with personnel at WEPCO, including WEPCO employee Tim McCollow, on a regular basis. Additionally, during the Relevant Time Period, CMS marketing personnel would contact personnel at WEPCO, including WEPCO employee Tim McCollow, and his co-workers at WEPCO via phone on a regular basis for the purpose of marketing natural gas and related services to WEPCO.

50. When in Wisconsin, CMS marketing personnel—including such CMS ERM/MST employees as Ann Burke, Steve Husband, George Hass and Gary Skarb—also met with personnel of

Wisconsin Gas Company for the purpose of selling natural gas and natural gas related services (transportation and storage) to that company during the Relevant Time Period. Wisconsin Gas Company had a long-term natural gas supply contract with CMS ERM/MST that was in effect during at least part of the Relevant Time Period.

51. During the Relevant Time Period, CMS ERM/MST gas marketing also talked to major gas purchasers in Wisconsin—including such companies as WEPCO, Wisconsin Gas Company, Wisconsin Public Service Corporation and WPS Energy Services—about transportation services through the Guardian Pipeline—a pipeline that runs from Illinois into Wisconsin—and CMS ERM/MST's involvement with its affiliate in the planning and construction of that pipeline, and how that pipeline would benefit WEPCO and other major gas users in Wisconsin once it became operational.

52. During the Relevant Time Period, CMS ERM/MST shipped over ANR Pipeline Company's pipelines in Wisconsin over 190,000 Dth of natural gas, which gas was delivered on information and belief to CMS ERM/MST's customers in Green Bay, Wisconsin, including Wisconsin Public Service Corporation (a Wisconsin corporation based in Green Bay, Wisconsin that purchased approximately $3MM worth of gas from CMS ERM/MST during the Relevant Time Period), and Integrys Energy Services, Inc (a Wisconsin corporation f/k/a WPS Energy Services, Inc. based in Green Bay, Wisconsin, which purchased approximately $27MM worth of natural gas from CMS ERM/MST during the

Relevant Time Period). CMS ERM/MST held title to that natural gas during the time that gas was transported from Louisiana to CMS ERM/MST's customers in Green Bay, Wisconsin.

53. Cantera Gas Company (f/k/a CMS Field Services, Inc., Inc.) at all relevant times was a Michigan corporation in good standing during the Relevant Time Period with its principal place of business in Tulsa, Oklahoma. CMS Field Services, Inc. was wholly owned and controlled during the Relevant Time Period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS Field Services, Inc. changed its name after the Relevant Time Period to CMS Continental Natural Gas, Inc., and later to Cantera Gas Company. CMS Field Services, Inc. was wholly owned and controlled by CMS Energy Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Field Services, Inc. and CMS ERM/MST sold. On or about February 1, 2005, the

Commodity Futures Trading Commission filed a civil action in United States District Court for the Northern District of Oklahoma, against Jeffrey A. Bradley (formerly the manager of marketing for CMS Field Services, Inc.), and Robert L. Martin (formerly the director of gas supply for CMS Field Services, Inc.) alleging that they conspired to submit false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, between January, 2001 and October, 2002. In one telephone conversation between Bradley and Martin, these men "openly discussed a plan to 'make up some numbers and turn them into the reporting firms.'" Further details regarding the conspiracy are set forth in *U.S. Commodity Futures Trading Commission v. Bradley*, 408 F. Supp. 2d 1214, 1221 (N.D. Okla. 2005)(decision denying defendants' motion to dismiss, based on the defendants' characterization of facts, which the court found at least in part "disingenuous, at best"); *U.S. Commodity Futures Trading Commission v. Bradley*, 2006 WL 2045847 (N.D. Okla.)(decision denying defendant Robert Martin's motion for summary judgment). CMS Field Services, Inc. marketed, sold, and transported natural gas during the Relevant Time Period in Wisconsin.

54. In November, 2003, CMS ERM/MST, along with its parent company CMS Energy Corporation, and its affiliated company CMS Field Services, Inc., paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

55. During the Relevant Time Period, on information and belief, CMS ERM/MST had a supply contract with Kaztex Energy Management, and Kaztex—as agent for numerous Wisconsin customers, including the Plaintiff and class members—purchased natural gas from CMS ERM/MST. During the Relevant Time Period, CMS ERM/MST knew that Kaztex was not an end user of natural gas. During the Relevant Time Period, CMS ERM/MST knew that Kaztex purchased natural gas on behalf of numerous Wisconsin industrial and commercial end users of natural gas.

H. **The Reliant Defendants and Co-Conspirators: Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), Reliant Energy Services, Inc., and CenterPoint Energy Services, Inc. (f/k/a "Reliant Energy Retail, Inc.").**

56. Co-conspirator Reliant Energy, Inc. is a Delaware corporation in good standing with it principal place of business in Houston, Texas. Reliant Energy, Inc. changed its name from Reliant Resources, Inc. in April, 2004. Reliant Resources Inc. was created as a subsidiary of Reliant Energy Incorporated sometime after 1999 in order to comply with the passage of the Texas Electric Choice Act, which required Reliant Energy Incorporated to split its regulated and unregulated businesses. The end result of that effort was that Reliant Energy Incorporated's business was split between Reliant Energy, Inc. and CenterPoint Energy, Inc., which process was completed in October, 2002. Prior to the split and during the Relevant Time Period, Reliant Energy, Inc. (f/k/a Reliant Resources Inc.) and

CenterPoint Energy Services, Inc. (f/k/a Reliant Energy Retail, Inc.), were wholly owned and controlled subsidiaries of Reliant Energy, Incorporated. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), is the successor in liability from Reliant Energy Incorporated. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), wholly owned and controlled its subsidiary Reliant Energy Services, Inc. during the Relevant Time Period, a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), buys, sells, and transports natural gas in the United States and in Wisconsin. On information and belief, grounds exist for disregarding the corporate fiction between the Reliant Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.*

57. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. The actions of Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.) were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Reliant Energy, Inc., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and

manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, the officers or directors of Reliant Energy, Inc., (f/k/a Reliant Resources, Inc.), such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, the officers or directors of Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as Reliant Energy Services, Inc.

58. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), through the activities of its corporate affiliates, in particular Reliant Energy Services, Inc., traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. Reliant

Energy, Inc. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.) and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials.

59. Defendant Reliant Energy Services, Inc. is a Delaware corporation registered as a foreign corporation in good standing in Wisconsin during the Relevant Time Period with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly owned and controlled during the Relevant Time Period by its parent, Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly owned and controlled by defendant Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.) concerning both the conduct of it business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy. Reliant Energy Services, Inc. buys, sells, and transports natural gas in the United States and in Wisconsin. On information and belief, during the Relevant Time Period Reliant Energy Services, Inc. sold natural gas to many members of the class, both itself and through middlemen, for use in Wisconsin. In November 2003, Reliant Energy Services, Inc. paid

an $18 million civil penalty to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, including charges of wash sales. The precise identity of the other parties that engaged in wash sales transactions with Reliant, are currently unknown to NewPage, but on information and belief are the other defendants in this action and the non-defendant co-conspirators named below. In November 2004, a former natural gas trader of Reliant Energy Services, Inc., Jerry A. Futch, was charged by the United States Department of Justice, U.S. Attorney's Office in the Southern District of Texas, based on a grand jury indictment for reporting false trades in 2000 and 2001 to industry price compilers which used the reported trades to calculate *Inside FERC*'s index price of natural gas. In 2005, Futch pled guilty to one count of delivering knowingly inaccurate reports concerning market information that affected and tended to affect the price of natural gas in interstate commerce.

60. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), is liable for the debts and obligations of its wholly owned and controlled subsidiary Reliant Energy Services, Inc. and for the actions of CenterPoint Energy Services, Inc. (f/k/a Reliant Energy Retail, Inc.) during the Relevant Time Period. Throughout the Relevant Time Period, Reliant Energy, Inc. was aware of the illegal behavior being engaged in by its subsidiaries, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding millions of

dollars in profits from its subsidiaries to its consolidated financials. On information and belief, the way in which the subsidiaries were created and capitalized, and the parent company's moves relating to discontinuing operations, have left the subsidiaries with insufficient assets to pay the judgment that was foreseeable when Reliant Energy Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiaries.

61. Defendant CenterPoint Energy Services, Inc., f/k/a Reliant Energy Retail, Inc., is a corporation organized and existing under the laws of the State of Delaware, registered to do business in the State of Wisconsin, with its principal place of business located at 1111 Louisiana, Houston, Texas. CenterPoint Energy Services, Inc. was formerly known as CenterPoint Energy Marketing, Inc., CenterPoint Energy Gas Services, Inc., and Reliant Energy Retail, Inc. During the Relevant Time Period, CenterPoint Energy Services, Inc. was a wholly owned subsidiary of Reliant Energy, Incorporated and sold natural gas at unlawfully inflated prices directly to the plaintiff Ladish Co., Inc. for use in Wisconsin, and to many other members of the class, both itself and through middlemen. Personal jurisdiction exists over CenterPoint Energy Services based upon its activities and on the activities of its corporate affiliates, that traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period.

I. Coral Energy Resources, L.P.

62. Defendant Coral Energy Resources, L.P. is a Delaware limited partnership in good standing with its principal place of business in Houston, Texas. Coral Energy Resources, L.P. is wholly owned and controlled by Coral Energy Holdings, L.P., and is an affiliate of Shell Oil Company, and Shell Trading Gas and Power Company. Coral Energy Resources, L.P. was one of the largest natural gas marketers in the United States and conducted natural gas marketing operations at eastern and western power and natural gas trading hubs for the Eastern and Western United States during the Relevant Time Period. Coral Energy Resources sells 100% of its parent companies' natural gas production. Coral Energy Resources, L.P. regularly conducts business in Wisconsin. Coral Energy Resources, L.P. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.

63. Defendant Coral Energy Resources, L.P. made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Coral Energy Resources, L.P.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the

Relevant Time Period Coral Energy Resources, L.P., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officers, directors and/or employees agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officers, directors, and/or employees made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Coral Energy Resources, L.P. sold in Wisconsin and elsewhere, and those policies and decisions were implemented on an operational level by Coral Energy Resources, L.P.'s employees in the United States and in Wisconsin. In July 2004, Coral Energy Resources, L.P. paid $30 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. In March 2005, Coral Energy Resources, L.P. agreed to

pay $3.5 million to resolve a dispute with the CFTC regarding whether it had sufficiently investigated, or accurately reported the results of its investigation, into trader false reporting of trades to index publishers during the Relevant Time Period. On information and belief, Coral and its affiliates engaged in nearly 150 wash trades during the Relevant Time Period. In February 2005, the CFTC filed federal civil injunction actions against Dennette Johnson, Courtney Cubbison Moore, Robert Harp, Anthony Dizona, John Tracy and Kelly Dyer—all employees or former employees of Shell Trading Gas and Power Company—seeking to bar their attempting to manipulate the price of natural gas in interstate commerce by reporting biased information to price reporting companies. Johnson, Moore, Harp, Dizona, Tracy and Dyer would regularly circulate an e-mail with directions to the traders to report prices in such a way that it would benefit either the positions of Shell Trading Gas and Power Company or Coral Energy Resources, L.P., to which the traders at Shell Trading Gas and Power Company provided services. This was done with the intent to manipulate prices during the Relevant Time Period. Further details regarding the conspiracy are set forth in *U.S. Commodity Futures Trading Commission v. Johnson*, 408 F. Supp. 2d 259 (S.D. Tex. 2005) (decision denying defendants' motion to dismiss).

J. The Xcel Defendants: Xcel Energy, Inc., E prime Inc. and Northern States Power Company

64. Defendant Xcel Energy, Inc., is a Minnesota corporation in good standing with its principal place of business in Minneapolis, Minnesota. Xcel Energy, Inc., wholly owned and controlled during the Relevant Time Period its subsidiary, E prime Inc., a Colorado corporation with its principal place of business in Denver, Colorado, its subsidiary Northern States Power Company, a Wisconsin corporation with its principal place of business in Eau Claire, Wisconsin, and NRG Energy, Inc., a Delaware corporation with its principal place of business in Minneapolis, Minnesota. On information and belief, grounds exist for disregarding the corporate fiction between the Xcel Defendants based on such cases as *Weibke*, *Consumer's Co-op.*, *Cemetery Services*, and *Conservatorship of Prom.* Xcel Energy, Inc., and its affiliates or divisions engaged in energy marketing and trading, and transportation, storage, and marketing of natural gas in Wisconsin during the Relevant Time Period.

65. Defendant Xcel Energy, Inc., during the Relevant Time Period was one of the largest power companies in the United States. Xcel Energy, Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Xcel Energy, Inc.'s actions were

intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin, during the Relevant Time Period. On information and belief, during the Relevant Time Period Xcel Energy, Inc., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officers or directors, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of defendants' unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officers or directors, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as E prime Inc., in the United States and in Wisconsin.

66. Personal jurisdiction exists over Xcel Energy, Inc., based upon the activities of its corporate affiliates, in particular E prime Inc., Northern States Power Company and NRG Energy, Inc., which

traded and sold natural gas in the United States and in Wisconsin during the Relevant Time Period. Xcel Energy, Inc., and its affiliates consistently have presented a common corporate image to customers in the United States and in Wisconsin through their marketing efforts and materials.

67. During the Relevant Time Period, Xcel Energy, Inc. owned and controlled NRG Energy, Inc. ("NRG"). NRG was formed in 1992 as a subsidiary of Northern States Power, which in 2000 was merged into New Century Energies, Inc., to form Xcel Energy, Inc. In 2001, NRG was one of the largest power companies worldwide, and sold natural gas to companies located in Wisconsin. In 2003, NRG commenced voluntary petitions under Chapter 11 of the bankruptcy code, and in November 2003, the bankruptcy court entered an order confirming NRG's plan of reorganization. From at least August 2001 through May 2002 (i.e., during the time NRG was owned and controlled by Xcel Energy, Inc.), NRG traders knowingly delivered false trade reports to price index compilers such as *Gas Daily* for the purpose of influencing the price of natural gas in interstate commerce. In July 2004, the CFTC commenced an action against NRG seeking a permanent injunction precluding NRG from making false trade reports.

68. Defendant E prime Inc. is a Colorado corporation in good standing with its principal place of business in Denver, Colorado. E prime Inc. is wholly owned and controlled by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis,

Minnesota. E prime Inc. is wholly owned and controlled by defendant Xcel Energy, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of Excel Energy, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which E prime Inc. sold in Wisconsin and elsewhere. E prime Inc. provided during the Relevant Time Period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States and in Wisconsin. E prime Inc. entered into a long term GISB natural gas supply agreement with WE Energies (or one or more of its subsidiaries) during the Relevant Time Period, and on information and belief sold natural gas to WE Energies (or one or more of its subsidiaries) pursuant to that agreement. In January 2004, Xcel Energy, Inc., and E prime Inc., paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

69. Defendant Northern States Power Company is a Wisconsin corporation with its principal place of business in Eau Claire Wisconsin. Northern States

Power Company is wholly owned and controlled by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Northern States Power Company is wholly owned and controlled by defendant Xcel Energy, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of defendants' unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of Excel Energy, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Northern States Power Company sold in Wisconsin and elsewhere. Northern States Power Company provided during the Relevant Time Period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States and in Wisconsin. In January 2004, Northern States Power Company affiliated companies Xcel Energy, Inc., and E prime Inc., paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

ALLEGATIONS COMMON TO ALL DEFENDANTS

70. The unlawful arrangements, contracts, agreements, combination and conspiracy set forth in this Complaint have been committed by defendants and were ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of defendants' business or affairs. At least by the summer of 2000, by their marketplace behavior and agreement as to pricing, defendants and the unnamed co-conspirators began and worked together to fraudulently increase the retail price of natural gas paid by commercial entities in Wisconsin. This fraudulent agreement is evidenced by, among other things, the daily exchange of price information by and among defendants and the unnamed co-conspirators and the use of computer software programs and websites (including Enron Online) by defendants and the unnamed co-conspirators, to collusively and artificially inflate the retail price of natural gas paid by commercial entities in Wisconsin. Traders at the defendants knew during the Relevant Time Period that price information being posted on Enron Online was inaccurate information, and rather than disregard that information, or report the inaccuracies, the traders went along with Enron's inaccurate price postings, frequently passed along those inaccurate postings to price index publishers, and themselves reported new inaccurate trade information to the publishers of indices so as to manipulate market prices.

71. In September 2002, five major traders and their companies, including Dynegy Marketing & Trade, CMS ERM/MST, Williams Energy Marketing & Trading, El Paso Merchant Energy, L.P., and American Electric Power Company, admitted that they provided falsified information to *Gas Daily* and *Inside FERC*. The purpose and effect of these actions was to collusively and artificially inflate the price of natural gas paid by commercial entities in Wisconsin above competitive levels, forcing commercial entity natural gas consumers in Wisconsin to pay much more for natural gas than they should have paid.

72. Upon information and belief, defendants were in regular and virtually continuous contact with one another, including regular and extremely frequent communications with respect to the spot price of natural gas and natural gas futures contracts.

73. Traders overstated prices to the reporting firms, which in turn published price data that incorporate the overstated prices. This pervasive false reporting in the natural gas market fed into the marketplace over and over again.

74. Defendants, directly or through their subsidiaries, affiliates, or agents, planned and executed a scheme designed to cause price instability and increase volatility in spot prices and thereby manipulate the price of natural gas futures. Defendants' unlawful conduct produced exorbitant illegal profits.

75. According to the CFTC, Platts' published indices had a financial impact upon billions of

dollars worth of natural gas transactions during the Relevant Time Period. Between November 2000 and October 2002, more than three-quarters of the trades some of the defendants submitted to Platts were knowingly false or misleading.

76. Not all companies in the natural gas industry engaged in the illegal behavior in which the defendants engaged during the Relevant Time Period. For instance, on information and belief, BP Energy Company was a major trader of natural gas in the United States during the Relevant Time Period, and established an effective program that ensured that the trading reports that BP Energy Company provided to publishers of price indices were accurate. The illegal behavior engaged in by the defendants was neither inevitable, nor natural, but was instead the result of a conscious decision by the defendants to collusively manipulate the markets to their advantage.

77. The behavior engaged in by the defendants and co-conspirators that forms the basis of this suit was not routine business behavior, but was instead highly illegal behavior that has resulted in the criminal conviction or indictment of numerous industry insiders. This illegal behavior, and the hundreds of millions of dollars in lucre that has flowed to the defendants during the Relevant Time Period due to their engaging and permitting this illegal behavior, was only possible because the defendants agreed to report their false trades to the industry publications and newsletters identified above, and to structure their contracts such that those contracts were pegged to the false reports

contained in those publications and newsletters. It was known in the natural gas producing and trading industry that these markets were susceptible to manipulation, and the defendants avoided taking steps to ensure that effective compliance and reporting programs were in place to prevent false reporting from occurring. Traders and executives at the defendant companies knew prior to the Relevant Time Period that false reporting could occur, knew early in the Relevant Time Period that Enron and many traders throughout the industry were engaging in false reporting, and rather than reporting such, or resisting such, agreed to go along with the practice, which caused substantial damages to the plaintiff class in this case.

78. Various other persons, entities, companies and corporations not named as defendants, and not otherwise identified above as co-conspirators, including some whose identities are presently unknown, participated as co-conspirators with defendants in the violations alleged herein and have made statements and performed acts in furtherance of those violations in the United States and elsewhere that had a direct, substantial, and reasonably foreseeable effect on commerce in Wisconsin. These other co-conspirators include, but are not limited to, Enron Energy Services, Inc. and Enron Power Marketing, Inc., which paid a $35 million civil penalty (May 2004) to the CFTC; Aquila Merchant Services, Inc., which paid a $26.5 million civil penalty (June 2004) to the CFTC; Calpine Energy Services, L.P., which paid a $1.5 million civil penalty (January 2004) to the CFTC; Cinergy Marketing & Trading, LP, which

paid a $3 million civil penalty (November, 2004) to the CFTC; Dominion Resources, Inc., which paid a $4.25 million civil penalty (September 2006) to the CFTC; Entergy Koch Trading L.P., which paid $3 million civil penalty (January 2004) to the CFTC; WD Energy Services Inc., f/k/a EnCana Energy Services, Inc., which paid a $20 million civil penalty (July 2003) to the CFTC; Enserco Energy, Inc., which paid a $3 million civil penalty (July 2003) to the CFTC; Entergy Koch Trading, L.P., which paid a $3 million civil penalty (January 2004) to the CFTC; Mirant Americas Energy Marketing, L.P., which paid a $12 5 million civil penalty (December 2004) to the CFTC; NRG Energy, Inc.; Western Gas Resources, Inc., which paid a $7 million civil penalty (July 2004) to the CFTC; Sempra Energy, including affiliate Sempra Energy Trading, and their respective officers, directors, and employees.

79. The CFTC order relating to WD Energy Services indicates that at least one of WD Energy Services' employees discussed false reporting with traders at two other energy companies. While NewPage does not know the precise identity of the other two energy companies, on information and belief, those two companies are defendants in this case.

80. Traders at Mirant Energy Marketing, L.P. conspired with one or more traders at Cinergy Corporation to make false reports of trades to market reporters so as to manipulate prices during the time period from January 2000 to early 2001. Specifically, Michael Whalen (a trader with Cinergy) had a telephone conversation with Christopher

McDonald (a trader with Americas Energy Marketing, L.P.), wherein they conspired about how they should report false trades to *Inside FERC* to manipulate market prices, and how to make such reports believable, with Whalen saying to McDonald "hey, do you want to fax me . . . exactly what you guys are going to write down so its more believable . . . I'll just write the exact opposite." These actions lead the CFTC to file a civil federal injunctive action against Whalen and McDonald and other traders at Mirant.

81. In another example, between May 2000 and October 2002, Matthew Reed, Darrell Danyluk and Shawn McLaughlin engaged in false reporting and attempted manipulation of natural gas prices while employed by Enserco Energy Services. Reed continued to engage in coordinated false reporting after he left Enserco, and became a trader at Concord Energy LLC. While at Enserco, Reed in Colorado and Danyluk in Calgary coordinated on an almost daily basis how they wanted to report fictitious trades to numerous reporting firms, including *Gas Daily*, and *National Gas Intelligence*. Reed and Danyluk called this their "double dipping" scheme and perpetrated their scheme on reporting firms by portraying the Colorado and Calgary offices as separate trading operations when they were not. These actions lead the CFTC to file a civil federal injunctive action against Reed, Danyluk, McLaughlin and Concord Energy, LLC in February 2005.

82. While each of the two causes of action stated in this complaint are distinct and separate causes of

action—with different elements and different available remedies—under each cause of action NewPage alleges that the defendants engaged in a conspiracy to manipulate prices as prohibited by Wis. Stat. § 133.03. As stated in further detail above and below, the defendants during the Relevant Time Period did the following:

a. The defendants engaged in "wash sales." A "wash sale" is an agreement by which Company A would agree with Company B that Company A would agree to sell a certain amount of natural gas at a certain price to Company B, and that in return Company B would sell roughly the same amount of natural gas at roughly the some price to Company A. By doing this, Company A and Company B would create the illusion of higher demand, and a higher volume of sales, in the market place, and would thus achieve their objective of increasing or otherwise manipulate the price of natural gas sold in interstate commerce.

b. The defendants agreed with each other to make and knowingly made false reports of natural gas trades to trade publications (such as *Gas Daily* and *Inside FERC*), knowing that those publications use those reports to report market prices and volumes, and knowing that by doing such they could manipulate markets to the detriment of natural gas buyers.

c. The defendants through the actions of their employees violated numerous criminal

statutes which prohibit wash trades and which prohibit the false reporting of market information.

d. The illegal, criminal behavior of the defendants was widespread in the industry, and was well known to be occurring by traders in the industry throughout the Relevant Time Period.

JURISDICTION AND VENUE

83. The resolution of this matter in Wood County is appropriate and permitted by Wis. Stat. § 801.50 because Wood County is a County in which the claim arose, and one or more of the defendants does or do substantial business in Wood County. NewPage was damaged in Wood County, as that is the location at which it paid more for natural gas than it should have. During the Relevant Time Period, CMS ERM/MST actively marketed natural gas in Wood County, on information and belief, CMS ERM/MST held title to gas transported in Wood County and gas sold by CMS ERM/MST was consumed in Wood County.

84. This Court has personal jurisdiction over the defendants consistent with the due process clause of the United States Constitution, and pursuant to Wis. Stat. § 801.05, because:

a. Pursuant to Wis. Stat. § 801.05(1), defendant Northern States Power Company is organized and exists pursuant to Wisconsin law.

b. Pursuant to Wis. Stat. § 801.05(1)(d), each of the defendants has engaged in substantial and not isolated activities within the State of Wisconsin.

c. Pursuant to Wis. Stat. § 801.05(2), Wis. Stat. ch. 133, and *Microsoft v. Olstad*, 284 Wis.2d 224 (2005), this action is and may be brought under Wisconsin Statutes that specifically confer grounds for personal jurisdiction over conspirators in antitrust cases, even if all acts of the defendant conspirators occurred outside of Wisconsin.

d. Pursuant to Wis. Stat. 801.05(4), each of the defendants directly or through an agent thereof committed one or more acts or omissions outside of Wisconsin, which caused an injury to person or property within Wisconsin, and during the Relevant Time Period, the defendants (either directly or on their behalf by others) carried out solicitation or service activities in Wisconsin, and natural gas sold or otherwise handled by the defendants was used or consumed in Wisconsin.

e. Pursuant to Wis. Stat. § 801.05(5)(c), this action arises out of a promise made to NewPage, or to a third party for the benefit of NewPage, by a defendant to deliver or to receive natural gas in Wisconsin.

f. Pursuant to Wis. Stat. § 801.05(5)(e), because this action relates to natural gas

actually received by NewPage in Wisconsin from one or more of the defendants.

RELEVANT STATUTORY SECTIONS

85. This case involves the following four sections in Wisconsin's Antitrust Statute (Wis. Stat. ch. 133): §§ 133.01, 133.03, 133.14 and 133.18.

86. Wis. Stat. § 133.01 provides:

> **Legislative intent.**
>
> The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

87. Wis. Stat. § 133.03 provides:

> **Unlawful contracts; conspiracies.**
>
> (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal.

88. Wisconsin's "Full Consideration Antitrust Statute, Wis. Stat. § 133.14, provides:

> **Illegal contracts void; recovery.**
>
> All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by § 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

89. Wisconsin's "Treble Damages Antitrust Statute," Wis. Stat. § 133.18, in relevant part provides:

> (1) . . . [A]ny person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefore and shall recover threefold the damages sustained by

the person and the cost of the suit, including reasonable attorney fees.

90. Finally, Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, provides: "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."

91. NewPage discovered the facts constituting its causes of action under Wis. Stat. ch. 133 less than six years before the filing of this action. For this reason, among others, including principles of tolling, this complaint is timely filed pursuant to Wis. Stat. § 133.18.

CLASS ACTION

92. NewPage brings this action both on behalf of itself and on behalf of a class consisting of all industrial and commercial direct purchasers of natural gas for their own use or consumption during the Relevant Time Period, and which gas was used or consumed by them in Wisconsin. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) entities that purchased natural gas from entities that sold natural gas at rates approved by the Wisconsin Public Service Commission (to the extent of such purchases at such approved rates); (d) defendants and their predecessors, affiliates and

subsidiaries; and (e) the federal government and its agencies.

93. This action is brought and may be properly maintained as a class action pursuant to Wis. Stat. § 803.08.

94. The class in this case is so numerous that joinder of all members is impracticable. On information and belief the class is very numerous, numbering in the hundreds or thousands, and it would be impractical to bring all members of the class before the Court.

95. There exists questions of common and general interest to all members of the class, including, but not limited to: (a) whether the defendants engaged in a conspiracy in violation of Wis. Stat. § 133.03; (b) whether NewPage and those Wisconsin purchasers of natural gas similarly situated are entitled to a "full consideration" recovery pursuant to Wis. Stat. § 133.14; and (c) whether NewPage and those Wisconsin purchasers of natural gas similarly situated are entitled to recover treble damages pursuant to Wis. Stat. § 133.18.

96. The claims of the proposed representative party are typical of the claims of the class.

97. NewPage is able to and will fairly and adequately represent the interests of the members of the class.

COUNT I: WIS. STAT. § 133.14 CLAIM

As and for its first cause of action, NewPage alleges as follows:

98. NewPage incorporates by reference the allegations in all of the preceding numbered paragraphs.

99. NewPage is an industrial user of natural gas that has operations in Wisconsin.

100. During the Relevant Time Period, NewPage entered into agreements to purchase natural gas for use in Wisconsin.

101. During the Relevant Time Period, the defendants were sellers of natural gas, and entered into contracts or agreements during the Relevant Time Period to sell natural gas for use or resale in Wisconsin.

102. During the Relevant Time Period, the defendants were each a member of a conspiracy prohibited by Wis. Stat. § 133.03.

103 While member(s) of a conspiracy prohibited by Wis. Stat. § 133.03, the defendants made agreements to sell natural gas which was purchased by NewPage and one or more of the class members, and those agreements were the result of, grew out of or were connected with a violation of Wis. Stat. § 133.03. Specifically, each of the defendants during the Relevant Time Period conspired to restrain trade or commerce relating to natural gas, and they received or benefited from the payments made by NewPage pursuant to NewPage's natural gas purchase agreements.

104. The actions of the conspiracy resulted in NewPage paying inflated prices for natural gas during the Relevant Time Period. During the

Relevant Time Period, natural gas prices in Wisconsin more than doubled. NewPage paid higher prices for natural gas than they otherwise would have paid if the defendants' conspiracy had not existed. The actual product around which the conspiracy centered was sold to purchasers in Wisconsin. The conspiracy also injured members of the class in Wisconsin, including NewPage, by among other things, depriving them of the right and ability to make risk management, resource allocation and other financial decisions relating to natural gas, in a full and free competitive market.

105. Because of the defendants' conspiracy in violation of § 133.03, the contracts or agreements the defendants entered into during the Relevant Time Period, which contracts or agreements were founded upon, are the result of or which grew out of or is connected with the defendants' violation of Wis. Stat. § 133.03, are void under the first sentence of Wis. Stat. § 133.14. Furthermore, under the second sentence of Wis. Stat. § 133.14, NewPage is entitled to recover from the defendants in this action the payments they made upon, under or pursuant to those void contracts or agreements, which payments were made either directly to any of the defendants, or to or for the benefit of any defendant, if and as the defendants benefited from those payments.

COUNT II: WIS. STAT. § 133.18 CLAIM

As and for its second cause of action, NewPage alleges as follows:

106. NewPage incorporates by reference the allegations in all of the preceding numbered paragraphs.

107. The defendants engaged in conduct prohibited by Wis. Stat. ch. 133. Specifically, the defendants violated Wis. Stat. § 133.03 during the Relevant Time Period by making contracts or engaging in a combination or conspiracy in restraint of trade or commerce relating to natural gas.

108. NewPage was injured by the defendants' violation of Wis. Stat. § 133.03, in that NewPage paid higher prices for natural gas during the Relevant Time Period than it would have if the defendants had not violated Wis. Stat. § 133.03. Thus, NewPage is entitled to recover treble damages, pursuant to Wis. Stat. § 133.18.

FRAUDULENT CONCEALMENT

109. Plaintiff had neither actual nor constructive knowledge that the defendants and their co-conspirators were violating the antitrust laws of Wisconsin, or of facts which might have led to the discovery thereof until years after the wrongdoing occurred. Defendants and co-conspirators engaged in a secret conspiracy that did not give rise to facts that would put plaintiff or the Class on inquiry notice that there was a conspiracy to manipulate natural gas prices. Plaintiff could not have discovered the existence of the conspiracy, the fact of its injuries, or any of the violations alleged herein by the exercise of due diligence until years after the wrongdoing occurred.

110. Furthermore, plaintiff could not have discovered any of the violations at an earlier time than it did despite its exercise of due diligence because of the deceptive practices and techniques of secrecy employed by defendants and their co-conspirators to avoid detection of and fraudulently to conceal such violations. Prior to its discovery of defendants' conspiracy and related wrongdoing, plaintiff was not aware of defendants' activities of reporting false trade information and prices for natural gas due to the false statements and misrepresentations by defendants and their co-conspirators that their prices for natural gas were very competitive and independently determined.

111. At all relevant times, defendants and their co-conspirators affirmatively concealed the existence of their illegal arrangements, contracts, agreements, combination and conspiracy and thereby tolled the statute of limitations. Plaintiff did not discover and could not have discovered defendants' unlawful conduct at an earlier date by the exercise of due diligence because defendants and their co-conspirators affirmatively and fraudulently concealed the existence of their arrangements, contracts, agreements, combination and conspiracy from plaintiff. Defendants' and their co-conspirators' documents and information demonstrate their attempts to fraudulently conceal their illegal conspiracy through various acts, including the following:

a. Some or all defendants and their co-conspirators conducted private, secret telephone communications, e-mails, and

discussions in the United States in order to confine knowledge of their unlawful arrangements, contracts, agreements, combination and conspiracy to a discrete group of individuals;

b. some or all defendants and their co-conspirators secretly coordinated the day-to-day conduct of the conspiracy, such as decisions regarding prices for natural gas and sending trade information to reporting firms;

c. some or all defendants destroyed records and notes of their unlawful telephone communications, e-mails, discussions, and agreements to conceal their illegal conduct;

d. some or all defendants and their co-conspirators falsely and fraudulently represented to IFERC, Gas Daily, and others that their prices and volumes for natural gas were honest, competitive, and independently determined;

e. some or all defendants utilized methods of communication in propagating their scheme that were difficult to trace and that tended to preserve the secrecy of their antitrust violations;

f. some or all defendants and their co-conspirators took care to conceal their meetings and discussions regarding price manipulation;

g. some or all defendants and their co-conspirators misrepresented themselves and their counter-parties to avoid detection by the trade publications;

h. some or all defendants and their co-conspirators falsely and fraudulently represented to the trade publications that the transactions they and their counterparties had reported to the trade publications were accurate;

i. some or all defendants and their co-conspirators falsely and fraudulently represented to the public that their false reporting and wash trading had no effect on natural gas prices; and

j. some or all defendants and their co-conspirators falsely represented to the government that they had not engaged in false reports or natural gas wash trades.

112. In addition, defendants' agreements, combination and conspiracy were self-concealing. Defendants did not disclose their collusive misconduct to plaintiff. In addition, defendants concealed their combination and conspiracy each time their employees reported false and misleading price and volume information to trade publications. At times, defendants even agreed with other defendants or co-conspirators to report each other as counterparties to false or misleading transactions in an effort to avoid detection by the trade publications and others.

113. Furthermore, the data necessary to evaluate whether defendants had manipulated natural gas prices through false reporting and wash trading and the impact of such conduct on gas prices involved non-public and/or proprietary information in defendants' control that was not provided to plaintiffs.

114. To date, plaintiff has identified a number of specific instances in which defendants fraudulently concealed their illegal conduct and its effects on natural gas prices. The following non-exhaustive list provides some examples of the manner in which defendants and their co-conspirators attempted to fraudulently conceal their illegal conspiracy:

a. Destruction of documents. At least some defendants likely destroyed documents detailing their conspiracy to manipulate natural gas prices. For example, testimony given in criminal proceedings relating to false reporting by El Paso employees demonstrates that supervisors at El Paso, including James Brooks, instructed their subordinates, including Alison Rietze and Randall Richards, to destroy any communications between El Paso and the trade publications.

b. Concealment of meetings and discussions. At least some defendants and co-conspirators concealed their meetings and discussions regarding natural gas price manipulation. For example, traders employed by various defendants, including but not limited to traders at CMS, at times

refused to discuss the manipulation of natural gas prices and their conspiracy over the phone because they knew they were talking on recorded phone lines. Similarly, Bo Collins, an El Paso employee, warned various executives, officers, or employees of El Paso that they should not discuss false reporting via email because of possible legal consequences.

c. Misrepresentation to avoid detection by trade publications. At least some defendants and co-conspirators coordinated with counterparties specifically to prevent the trade publications from uncovering the conspiracy. For example, Michelle Valencia, a trader at Dynegy, instructed other Dynegy employees to represent themselves as employees of West Coast Power LLC, a Dynegy affiliate, when reporting false transactions to trade publications to avoid detection. Michelle Valencia also coordinated transactions that did not occur with Rick Anderssen, a trader employed by a co-conspirator, and together reported false counterparty information to avoid suspicion by the trade publications.

d. Misrepresentations to investigative authorities and the public. At least some defendants and co-conspirators falsely represented to the government and the public that they had not engaged in false reports or natural gas wash trades during the relevant time period. For example, Scott

Thompson, a former Williams trader, fraudulently explained to FBI agents that he had not made false reports to trade publications. In addition, although CMS represented to the public and the federal government that it had not engaged in natural gas wash trades, CMS employees recognized that these representations were not accurate and that they knew that Tamela Pallas, then chief executive officer of CMS Marketing Services & Trading, had entered into at least one natural gas wash trade with Pat Strange, a former Reliant trader. CMS also revealed that certain high-ranking individuals had left its employ because of activity relating to round-trip trading, even while CMS continued to deny that it engaged in any wrongdoing. Further, various defendants entered into offsetting natural gas transactions with other defendants or co-conspirators, despite having represented to the government and the public that they had not engaged in natural gas wash trades.

e. Press releases and other statements attempting to minimize the effect of defendants' illegal conduct. At least some defendants and co-conspirators explained that they had no reason to believe that their false reporting or wash trading had any effect on market prices. For example, in a January 13, 2003 press release, El Paso stated that it had no evidence that its

subsidiary's reporting to Inside FERC resulted in an unrepresentative price index.

115. Plaintiff asserts that, as a result of the fraudulent concealment of the defendants' and co-conspirators' conspiracy and related wrongdoing, it did not discover, or have reason to discover, the facts constituting its causes of action until years after such wrongdoing occurred, and less than six years before the filing of its original complaint.

DEMAND FOR JUDGMENT

WHEREFORE, NewPage, on behalf of itself and all others similarly situated, demands judgment against defendants as follows:

A. That the Court certify the class as described herein and permit this action to proceed as a class action with NewPage designated as the representative of the class;

B. A declaration pursuant to Wis. Stat. § 133.14 and Wis. Stat § 806.04 that the above-described contracts and agreements that the defendants entered into during the Relevant Time Period are void, and further that the defendants are jointly and severally liable pursuant to Wis. Stat. § 133.14 to NewPage and members of the class for repayment of the amounts paid for natural gas during the Relevant Time Period as the defendants benefited from those payments, in an amount to be determined at trial;

C. Pursuant to Wis. Stat. § 133.18(1)(a), an award of three times actual damages sustained by NewPage and members of the class, in an amount to

be determined at trial, reduced after trebling by any amount actually recovered under the § 133.14 claim for the same injury.

D. An award of the costs and disbursements of this action, including class notice costs and interest;

E. An award of attorneys' fees pursuant to Wis. Stat. § 133.18(1)(a), or as otherwise may be permitted by Wisconsin law, for the services herein rendered by class counsel;

F. Pre-judgment and post judgment interest in the full amount as may be permitted by law; and

G. Any and all other relief to which NewPage and members of the class are entitled, in equity or at law, under the laws of the State of Wisconsin.

DEMAND FOR JURY TRIAL

Plaintiff requests trial by jury of all issues so triable.

REQUEST FOR EXPEDITED PROCEEDINGS

Wis. Stat. § 133.18(5) provides:

> Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date.

Pursuant to Wis. Stat. § 133.18(5), NewPage requests that this action and all motions and proceedings in this action be expedited, consistent with the intent and remedial goals of the Wisconsin legislature as expressed in Wis. Stat. §§ 133.01 and 133.18(5).

Dated this 2nd day of July, 2010.

Attorneys for NewPage Wisconsin System Inc.

By: */s/ Robert L. Gegios*
Robert L. Gegios
State Bar No. 1002906
Alexander T. Pendleton
State Bar No. 1011759
William E. Fischer
State Bar No. 1045725
KOHNER, MANN & KAILAS, S.C.
Barnabas Business Center
4650 N. Port Washington Road
Milwaukee, WI 53212-1059
Telephone: (414) 962-5110
Facsimile: (414) 962-8725

R. LAWRENCE WARD
JENNIFER GILLE BACON
GREGORY M. BENTZ
POLSINELLI SHUGHART P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City,
Missouri 64105-1929
(816) 421-3355;
(816) 374-0509 (FAX)

510

DONALD D. BARRY
BARRY LAW OFFICES, L.L.C.
DONALD D. BARRY
CHARTERED
5340 S.W. 17th Street
P.O. Box 4816
Topeka, Kansas 66604
(785) 273-3151;
(785) 273-5115 (FAX)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case No.

ARANDELL CORPORATION,
13118 Leon Road
Menomonee Falls, WI 53501,

MERRICK'S INC.,
2415 Parview Rd.
P.O. Box 620307
Middleton, WI 53562,

SARGENTO FOODS INC.,
One Persnickety Place
Plymouth, WI 53073,

LADISH CO., INC.,
5481 S. Packard Ave.
Cudahy, WI 53110,

CARTHAGE COLLEGE,
2001 Alford Dr.
Kenosha, WI 53140, and

BRIGGS & STRATTON CORPORATION,
12301 W. Wirth St.
Wauwatosa, WI 53222

Plaintiffs,

CMS ENERGY CORPORATION, and
CMS ENERGY RESOURCE MANAGEMENT
COMPANY (f/k/a CMS MARKETING SERVICES
AND TRADING COMPANY),
One Energy Plaza
Jackson, MI 49201, and

CANTERA GAS COMPANY
(f/k/a CMS FIELD SERVICES, INC.)
30600 Telegraph Rd.
Bingham Farms, MI 48025

Defendants.

JUDGE:

CLASS ACTION

JURY TRIAL DEMANDED

COMPLAINT

The plaintiffs Arandell Corporation, Merrick' s, Inc., Sargento Foods Inc., Ladish Co., Inc., Carthage College, and Briggs & Stratton Corporation, on behalf of themselves and all others similarly situated, by their attorneys, for their complaint, allege as follows:

PARTIES

1. Plaintiffs bring this class action pursuant to the Wisconsin Antitrust Act (Wis. Stat. ch. 133), brought by and on behalf of a class consisting of all industrial and commercial purchasers of natural gas for their own use or consumption between January 1, 2000 and October 31, 2002 (the "Relevant Time

Period"), and which gas was used or consumed by them in Wisconsin. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) entities that purchased natural gas from entities that sold natural gas at rates approved by the Wisconsin Public Service Commission (to the extent of such purchases at such approved rates); (d) defendants and their predecessors, affiliates and subsidiaries; and (e) the federal government and its agencies.

2. Plaintiff Arandell Corporation is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Menomonee Falls, Wisconsin. Arandell Corporation is a leading printer of catalogs for retailers. During the Relevant Time Period, Arandell, through its purchasing agent Kaztex Energy Management, purchased natural gas directly from defendant CMS Energy Marketing and Trade, as well as several other co-conspirators named herein.

3. Plaintiff Merrick's, Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Middleton, Wisconsin. Merrick's, Inc. is a leading manufacturer and processor of baby animal feed products.

4. Plaintiff Sargento Foods Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in

Plymouth, Wisconsin. Sargento Foods Inc. is a leading processor and distributor of cheese.

5. Plaintiff Ladish Co., Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Cudahy, Wisconsin. Ladish designs and manufactures high-strength forged and cast metal components for aerospace and industrial markets. It is one of the largest users of natural gas in the state of Wisconsin, each year purchasing several million dollars worth of natural gas for its operations.

6. Plaintiff Carthage College is a private educational institution with its campus in Kenosha, Wisconsin. Carthage College is a college of the liberal arts and sciences with a current enrollment of roughly 2,250 full-time students, and is affiliated with the Evangelical Lutheran Church in America. During the Relevant Time Period, Carthage College, through its purchasing agent Kaztex Energy Management, purchased natural gas directly from defendant CMS Energy Marketing and Trade, as well as several other co-conspirators named herein.

7. Plaintiff Briggs & Stratton Corporation is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Milwaukee, Wisconsin. Briggs & Stratton Corporation is the world's largest producer of air-cooled gasoline engines for outdoor power equipment. During the Relevant Time Period, Briggs & Stratton Corporation's natural gas purchases totaled over $11 6 million, making it one of the largest industrial users of natural gas in Wisconsin. During the Relevant Time Period, Briggs

& Stratton, through its purchasing agent Kaztex Energy Management, purchased natural gas directly from defendant CMS Energy Marketing and Trade, as well as several other co-conspirators named herein.

8. Defendant CMS Energy Corporation is a Michigan corporation in good standing with its principal place of business in Jackson, Michigan.

9. Defendant CMS Energy Resource Management Company (f/k/a CMS Marketing Services and Trading Company) (hereinafter "CMS ERM/MST") was a Michigan corporation registered as a foreign corporation in good standing in Wisconsin during the Relevant Time Period with its principal place of business in Jackson, Michigan, and later in Houston, Texas.

10. Defendant Cantera Gas Company (f/k/a CMS Field Services, Inc.) at all relevant times was a Michigan corporation in good standing during the Relevant Time Period with its principal place of business in Tulsa, Oklahoma.

JURISDICTION, DAMAGES AND VENUE

11. Jurisdiction exists in this Court under 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 exclusive of interest and costs, and the plaintiffs and defendants reside in or are entities of different states.

12. Venue is proper in the Eastern District of Michigan for purposes of trial pursuant to 28 U.S.C. § 1391 because, during the Relevant Time Period, defendants CMS Energy Corporation and CMS

ERM/MST had principal places of business in Jackson County, Michigan, and defendant Cantera Gas Company (f/k/a CMS Field Services, Inc.) had a primary place of business in Wayne County, Michigan, both of which are in the Eastern District of Michigan.

13. The Wisconsin Antitrust Act (Wis. Stat. ch. 133) governs this case because the named plaintiffs and the putative class members were all injured in Wisconsin, the named plaintiffs and the putative class members are all Wisconsin-based entities, the named plaintiffs and putative class members all purchased natural gas in Wisconsin for use or consumption in Wisconsin, the relationship between the plaintiffs and defendants and their co-conspirators is centered in Wisconsin, defendants conduct substantial business in Wisconsin, and defendants and their co-conspirators committed acts in furtherance of the conspiracy giving rise to this action in Wisconsin. Moreover, the Wisconsin Antitrust Act (Wis. Stat. ch. 133) reaches extra-territorial anticompetitive acts that affect citizens of Wisconsin or otherwise impact Wisconsin. *See Meyers v. Bayer AG*, 735 N.W.2d 448, 461 (Wis. 2007); *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 158 (Wis. 2005). Because defendants' conspiracy resulted in a historically unprecedented increase in the price of natural gas in Wisconsin, plaintiffs and the putative class members are entitled to recovery under the Wisconsin Antitrust Act. *See id.*

NATURAL GAS AND WISCONSIN COMMERCE

14. Each year, Wisconsin consumes over 350,000,000 thousand cubic feet (Mcf) of natural gas. That translates (depending on the price) to an expense to the Wisconsin economy of between 1.75 and 3.5 billion dollars per year, in a state that has a total gross domestic product (total value of goods and services produced in the state) of only 215 billion dollars per year. During the Relevant Time Period, Wisconsin consumed over one billion Mcf of natural gas.

15. Natural gas plays a primary role in the Wisconsin economy, as it is used as a heating fuel for many buildings, generates a substantial percentage of the electricity consumed, and is the primary energy source for many industries (including such major Wisconsin industries as the metal working, food processing, brewing and dairy processing industries). As then President Bush said in speech given in Appleton, Wisconsin in 2004, "[n]atural gas is absolutely vital for many manufacturers in Wisconsin."

16. Wisconsin produces no natural gas. All natural gas consumed in Wisconsin is produced elsewhere. Additionally, most companies that trade in natural gas, including trading natural gas that is consumed in Wisconsin, do not have their principal places of business or trading desks located in Wisconsin. Because of this, a conspiracy relating to natural gas prices has a greater impact on Wisconsin commerce than such a conspiracy would have on commerce in many other states. A conspiracy to manipulate natural gas prices, while economically

benefiting the economies of some other states—such as Texas, Oklahoma and other states where producers and traders of natural gas tend to concentrate—has only negative consequences in Wisconsin.

17. The price manipulation conspiracy engaged in by the defendants and their co-conspirators during the Relevant Time Period had a profoundly negative impact on commercial entities in Wisconsin. For example, according to the Energy Information Agency, the city gate price for natural gas in Wisconsin increased from a price of $2.94 Mcf in January 2000, to a price of $9.92 Mcf in January 2001. The average monthly price for natural gas commercial consumers in Wisconsin (including institutional consumers but not industrial consumers) increased from $5.03 per Mcf in January 2000, to $11.05 per Mcf in January 2001. On information and belief, this was a historically unprecedented change in prices, which cannot be explained by a shortage of natural gas, or an increase in demand for natural gas. According to the Energy Information Agency, this change in prices resulted in the average annual price for commercial consumers increasing from a price per Mcf of $4.84 in 1999, to $6.32 in 2000, and then to $7.55 in 2001. Because of this, Wisconsin commercial consumers paid over one hundred million dollars more for natural gas in just 2001 compared to 2000. The conspiracy engaged in by the defendants and their co-conspirators also increased price volatility in the natural gas market, which caused commercial entities in Wisconsin to incur greater expenses associated with hedging natural gas costs.

OVERVIEW OF PLAINTIFFS' CAUSES OF ACTION

18. The plaintiffs allege in this case two causes of action, the first under Wis. Stat. § 133.14 (Wisconsin's "Full Consideration Antitrust Statute") and the second under Wis. Stat. § 133.18 (Wisconsin's "Treble Damages Antitrust Statute").

19. Under the first cause of action, the plaintiffs seek a declaratory judgment that certain natural gas contracts and agreements made during the Relevant Time Period are void pursuant to Wis. Stat. § 133.14. The grounds for such a ruling are that during the Relevant Time Period the defendants were members of a conspiracy prohibited by Wis. Stat. § 133.03. Specifically, the defendants are sellers of natural gas, and during the Relevant Time Period each of them conspired to restrain trade or commerce relating to natural gas. As such, the contracts or agreements that relate to Wisconsin for the sale of natural gas that were made by the defendants while in the conspiracy—which contracts or agreements were founded upon, were the result of, grew out of or were connected with the conspiracy, either directly or indirectly—are void pursuant to Wis. Stat. § 133.14. The plaintiffs request that the Court formally declare those contracts or agreements void pursuant to Wis. Stat. 806.04, Wisconsin's Uniform Declaratory Judgment Act, or pursuant to 28 U.S.C. § 2201 *et seq.*

20. Wis. Stat. § 133.14 further provides that because the defendants were members of a conspiracy prohibited by Wis. Stat. § 133.03, none of them may recover on, or benefit from, any such void

contract. Furthermore, under the second sentence of Wis. Stat. § 133.14, the plaintiffs are entitled to recover from the defendants the payments they made for natural gas during the Relevant Time Period, to the full extent that the defendants benefited from those payments. Wis. Stat. § 133.03 and § 133.14 are remedial statutes, which were created by the Wisconsin legislature to deter companies from engaging in price collusion, so as to protect the free market system. The legislature wanted to deter price collusion so that the benefits of free market lower prices—which benefits can and should flow to the public—are not denied by unlawful collusion. Because the defendants violated Wis. Stat. § 133.03 and because those agreements are void under Wis. Stat. § 133.14, plaintiffs are entitled to recover from the defendants in this action the full amount of the payments the plaintiffs made for natural gas during the Relevant Time Period to the full extent the defendants benefited from those payments.

21. Under the second separate and independent cause of action, the plaintiffs allege that the defendants violated Wis. Stat. § 133.03. Specifically, the defendants are sellers of natural gas, and during the Relevant Time Period, the defendants violated Wis. Stat. § 133.03 by conspiring to restrain trade or commerce relating to natural gas. The plaintiffs were directly or indirectly injured by such conduct. As such, the plaintiffs are entitled pursuant to Wis. Stat. § 133.18 to recover three times the damages sustained by them from the defendants, reduced after trebling by any payments actually recovered by

the plaintiffs under the plaintiffs' claim under Wis. Stat. § 133.14.

22. Although the federal government, through the Federal Energy Regulatory Commission, regulates a small portion of sales of natural gas in the United States, the plaintiffs herein do not seek to recover damages for any sales the price of which is set via a regulatory procedure by the Federal Energy Regulatory Commission. The natural gas transactions that are the subject of this case were deregulated pursuant to various statutory provisions (see, The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301(21) (1994) (first sales are defined in § 2(21)); Section 601(a)(1)(C) of the NGPA, as amended by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60) (no FERC jurisdiction over first sales); The Energy Policy Act of 1992, 15 U.S. Code § 3431 and pursuant to Federal Energy Regulatory Commission Order No. 547, 61 FERC 61281 (November 30, 1992), Order No. 636, 57 FERC 30939 (April 8, 1992, and Order No. 636-A, 57 FERC 36128 (August 12, 1992)).

DEFENDANTS

23. Defendant CMS Energy Corporation is a Michigan corporation in good standing with its principal place of business in Jackson, Michigan. CMS Energy Corporation wholly owned and controlled during the Relevant Time Period its subsidiary CMS ERM/MST, a Michigan corporation with its principal place of business in Houston, Texas. CMS Energy Corporation wholly owned and controlled during the Relevant Time Period CMS Field Services, Inc. (n/k/a Cantera Gas Company), a

Michigan corporation with its principal place of business in Tulsa, Oklahoma. On information and belief, CMS Energy Corporation was directly involved in the day-to-day natural gas trading operations of its subsidiaries, defendants CMS ERM/MST, and Cantera Gas Company (f/k/a CMS Field Services, Inc.).

24. Defendant CMS Energy Corporation, directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. CMS Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period CMS Energy Corporation, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, CMS Energy Corporation's officers or directors, such as Victor J. Fryling, President and Chief Operating Officer, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United

States and in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, CMS Energy Corporation's officers or directors, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as CMS ERM/MST and CMS Field Services, Inc., in the United States and in Wisconsin.

25. Personal jurisdiction exists over defendant CMS Energy Corporation because it has its principal place of business in Jackson, Michigan, and because it conducts systematic and continuous business in Michigan.

26. Defendant CMS ERM/MST was a Michigan corporation registered as a foreign corporation in good standing in Wisconsin during the Relevant Time Period with its principal place of business in Houston, Texas. CMS ERM/MST was wholly owned and controlled during the Relevant Time Period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS ERM/MST was wholly owned and controlled by defendant CMS Energy Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of its unlawful

arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of defendants' unlawful agreements, officers or directors of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS ERM/MST sold. CMS ERM/MST bought, sold and transported natural gas, including its own or its affiliates' production, during the Relevant Time Period in the United States and in Wisconsin.

27. During the Relevant Time Period, on information and belief, CMS ERM/MST had a supply contract with Wisconsin-based Kaztex Energy Management ("Kaztex"). Kaztex, as agent for plaintiffs Arandell Corp., Briggs & Stratton Corp. and Carthage College (along with other members of the proposed class), purchased natural gas from CMS ERM/MST. During the Relevant Time Period, CMS ERM/MST knew that Kaztex was not an end user of natural gas, and knew that Kaztex purchased natural gas on behalf of others.

28. Personal jurisdiction exists over defendant CMS ERM/MST because it is organized and exists under Michigan law and has its principal place of business in Jackson, Michigan, and because it conducts systematic and continuous business in Michigan.

29. Defendant Cantera Gas Company (f/k/a CMS Field Services, Inc.) at all relevant times was a Michigan corporation in good standing during the Relevant Time Period with its principal place of business in Tulsa, Oklahoma. CMS Field Services, Inc. was wholly owned and controlled during the Relevant Time Period by its parent, CMS Energy Corporation, a Michigan corporation with its principal place of business in Jackson, Michigan. CMS Field Services, Inc. changed its name after the Relevant Time Period to Cantera Gas Company. CMS Field Services, Inc. was wholly owned and controlled by defendant CMS Energy Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of its unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of CMS Energy Corporation, such as Victor J. Fryling, President and Chief Operating Officer, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which CMS Field Services, Inc. and CMS ERM/MST sold. CMS Field Services, Inc. bought, sold, stored, and transported natural gas, including its own or its affiliates' production, during the Relevant Time Period in the United States and in Wisconsin.

30. Personal jurisdiction exists over defendant Cantera Gas Company (f/k/a CMS Field Services,

Inc.) because, during the Relevant Time Period, CMS Field Services, Inc. was organized and existed under the laws of Michigan, and because CMS Field Services, Inc. conducted systematic, continuous, and substantial business in Michigan.

31. On or about February 1, 2005, the Commodity Futures Trading Commission filed a civil action in United States District Court for the Northern District of Oklahoma, against Jeffrey A. Bradley (formerly the manager of marketing for CMS Field Services, Inc.), and Robert L. Martin (formerly the director of gas supply for CMS Field Services, Inc.) alleging that they conspired to submit false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, between January, 2001 and October, 2002. In one telephone conversation between Bradley and Martin, these men "openly discussed a plan to 'make up some numbers and turn them into the reporting firms.'" Further details regarding the conspiracy are set forth in *U.S. Commodity Futures Trading Commission v. Bradley*, 408 F. Supp. 2d 1214, 1221 (N.D. Okla. 2005)(decision denying defendants' motion to dismiss, based on the defendants' characterization of facts, which the court found at least in part "disingenuous, at best"); *U.S. Commodity Futures Trading Commission v. Bradley*, 2006 WL 2045847 (N.D. Okla. 2006)(decision denying defendant Robert Martin's motion for summary judgment).

32. In November, 2003, CMS Energy Corporation, CMS ERM/MST, and CMS Field Services, Inc. (collectively "Defendants") paid $16 million in civil

penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

CO-CONSPIRATORS

The AEP Entities: American Electric Power Company and AEP Energy Services, Inc.

33. American Electric Power Company is a New York corporation in good standing and has its principal place of business in Columbus, Ohio. The American Electric Power Company wholly owned and controlled during the Relevant Time Period its subsidiary AEP Energy Services, Inc., an Ohio corporation with its principal place of business in Columbus, Ohio. On information and belief, American Electric Power Company was directly involved in the day-to-day natural gas trading operations of its subsidiary, AEP Energy Services, Inc. American Electric Power Company buys, sells and transports electricity and natural gas, including its own and its affiliates' production, in the United States and in Wisconsin.

34. American Electric Power Company, directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy with the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. On information and belief, during the Relevant Time Period American Electric Power Company, either

directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. American Electric Power Company's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officers or directors agreed to, or directed others to agree to, arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Wisconsin. During the Relevant Time Period and in furtherance of its unlawful arrangements, contracts, agreements, and combination and conspiracy, American Electric Power Company's officers or directors, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as AEP Energy Services, Inc. According to a FERC Report, American Electric Power Company and AEP Energy Services, Inc. traders were instructed by their superiors to adjust the prices and volumes of trades they had made and, in some cases, to report trades

that never occurred, because it was common practice in the industry.

35. AEP Energy Services, Inc. is an Ohio corporation in good standing and has its principal place of business in Columbus, Ohio. AEP Energy Services, Inc. is wholly owned and controlled by its parent, American Electric Power Company, an Ohio corporation with headquarters in Columbus, Ohio. AEP Energy Services, Inc. is wholly owned and controlled by American Electric Power Company concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, and combination and conspiracy among and between Defendants, various AEP entities, and others. During the Relevant Time Period and in furtherance of these unlawful agreements, one or more officers or directors of American Electric Power Company, Inc. made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which AEP Energy Services, Inc. sold. AEP Energy Services, Inc. bought, sold and transported natural gas during the Relevant Time Period, including its own or its affiliates' production, in the United States and in Wisconsin.

36. In September 2005 the CFTC filed a civil action against Joseph Foley, a former trader employed by American Electric Power Company and AEP Energy Services, Inc. The complaint alleges that from November 2000 through September 2002,

Foley engaged in a pervasive and widespread scheme involving his directing those he supervised to deliver to market index publishers false reports concerning natural gas trades. As part of Foley's scheme, at one of the trading desks owned by either American Electric Power Company or its affiliate AEP Energy Services, Inc., the traders maintained electronic spreadsheets entitled "IFERC Bogus" and "Joe Mama" to record false trades. American Electric Power Company or AEP Energy Services, Inc. rewarded Foley for the funds he brought into the companies based on his reporting false trades, awarding him over $2 million in bonus compensation in 2002.

37. In January 2005, American Electric Power Company and AEP Energy Services, Inc. paid $30 million in civil penalties to the CFTC to settle charges of false reporting and attempted manipulation of natural gas prices. AEP Energy Services, Inc. also paid $30 million in civil penalties to the United States Department of Justice while acknowledging and accepting responsibility for submitting knowingly inaccurate trade information for its Gulf Natural Gas Trading Desk, and for two other trading desks covering the Northeast and Mid-Continent regions.

38. American Electric Power Company, Inc. was directly involved in the natural gas trading operations of AEP Energy Services, Inc. by, among other things, issuing several hundred guaranties to counterparties to natural gas transactions with AEP Energy Services, Inc. that were material and essential to undertaking such transactions.

39. American Electric Power Company, Inc. is liable for the debts and obligations of its wholly owned subsidiary AEP Energy Services, Inc. Throughout the Relevant Time Period, American Electric Power Company, Inc. was aware of the illegal behavior being engaged in by its subsidiary, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding hundreds of millions of dollars in profits from its subsidiary to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on October 10, 2002, American Electric Power Company, Inc.'s Chairman, President and CEO E Linn Draper announced "a significant down sizing of our trading and marketing operations" (i.e., AEP Energy Services, Inc.). On information and belief, the way in which the subsidiary was created and capitalized, and the parent company's moves discontinuing operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when American Electric Power Company, Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

The ONEOK Entities: ONEOK Inc. and ONEOK Energy Marketing and Trading Company, L.P.

40. ONEOK Inc. is a Delaware corporation which has its principal place of business in Tulsa, Oklahoma. ONEOK Inc. wholly owns ONEOK Energy Marketing and Trading Company, L.P., and other affiliates or divisions that regularly sold natural gas consumed in Wisconsin, and to

Wisconsin businesses. ONEOK Inc. buys, sells, transports, and stores natural gas, including its own and its affiliates' production, in the United States and in Wisconsin.

41. ONEOK Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy with the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. ONEOK Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period ONEOK either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, ONEOK Inc.'s officers or directors, including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and

conspiracy, ONEOK Inc.'s officers or directors, including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as ONEOK Energy Marketing and Trading Company, L.P., in the United States and in Wisconsin.

42. ONEOK Energy Marketing and Trading Company, L.P., is a Delaware limited partnership in good standing and has its principal place of business in Tulsa, Oklahoma. ONEOK Energy Marketing and Trading Company, L.P., is wholly owned and controlled by ONEOK, Inc. concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of its unlawful arrangements, contracts, agreements, combination and conspiracy. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, combination and conspiracy, one or more officers or directors of ONEOK, Inc., including "Senior Management Team" member Christopher R. Skoog, President of ONEOK Energy Marketing and Trading Company, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which ONEOK

Energy Marketing and Trading Company, L.P. sold in Wisconsin and elsewhere. ONEOK Energy Marketing and Trading Company, LP., buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

43. In October 2002, ONEOK, Inc. and ONEOK Energy Marketing and Trading, L.P., paid $3 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting of natural gas prices during the time period from at least July 2000 to October 2002.

The Williams Entities: The Williams Companies, Inc., Williams Power Company, Inc. (f/n/a Williams Energy Marketing & Trading) and Williams Merchant Services Company, Inc.

44. The Williams Companies, Inc. is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. The Williams Companies, Inc. wholly owns and controls Williams Power Company, Inc., Williams Merchant Services Company, Inc. and other affiliates or divisions that regularly sold natural gas consumed in Wisconsin, and to Wisconsin businesses. The Williams Companies, Inc. through its affiliates, buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

45. The Williams Companies, Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy with the

Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. On information and belief, during the Relevant Time Period The Williams Companies, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. The Williams Companies, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officers or directors, such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, The Williams Companies, Inc.'s officers or directors, such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the

calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Williams Power Company, Inc. and Williams Merchant Services Company, Inc. in the United States and in Wisconsin.

46. Williams Merchant Services Company, Inc., is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. is wholly owned and controlled by its parent company, The Williams Companies, Inc. a Delaware corporation with headquarters in Tulsa, Oklahoma. Williams Merchant Services Company, Inc. wholly owns and controls Williams Power Company, Inc. Williams Merchant Services Company, Inc. is wholly owned and controlled by The Williams Companies, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, and combination and conspiracy among and between Defendants, various Williams entities, and others. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of The Williams Companies, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Williams Merchant Services

Company, Inc. or its affiliate Williams Power Company, Inc. sold in Wisconsin and elsewhere. Williams Merchant Services Company, Inc. buys, sells, stores and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

47. Williams Power Company, Inc. (f/k/a Williams Energy Marketing & Trading) is a Delaware corporation in good standing and has its principal place of business in Tulsa, Oklahoma. Williams Power Company, Inc. is wholly owned and controlled by Williams Merchant Services Company, Inc., which in turn is wholly owned and controlled by its parent, The Williams Companies, Inc. Williams Power Company, Inc. is wholly owned and controlled by Williams Merchant Services Company, Inc. and The Williams Companies, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, combination and conspiracy among and between the Defendants, various Williams entities, and others. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, officers and directors of The Williams Companies, Inc. and Williams Merchant Services Company, Inc., such as William E. Hobbs, President and Chief Executive Officer of Williams Power Company, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which

Williams Power Company, Inc. sold in Wisconsin and elsewhere. Williams Power Company, Inc. buys, sells, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

48. The Williams Companies, Inc. and Williams Power Company, Inc. Company paid $20 million in civil penalties in July 2003 to the United States Commodity Futures Trading Commission to settle charges of attempting to manipulate natural gas price indices. On December 17, 2004, a former trader of Williams Energy Marketing & Trading Company, Thomas J. Pool, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms from mid-1998 through mid-2002 for the purpose of manipulating monthly price indices of natural gas. As part of his plea agreement he admitted that he had the ability to influence the market price of natural gas in interstate commerce, that the published index price of natural gas was artificial in that it did not reflect the legitimate forces of supply and demand, that his conduct was the cause of the artificial price, and that he intended to cause the artificial price. Mr. Pool admitted that most of the trades he reported while an employee of Williams were deliberately fabricated. Mr. Pool admitted creating fictitious natural gas trades at the behest of his supervisor. Mr. Pool also admitted that he was trained and directed by his supervisors to undertake and cover-up the manipulation of natural gas prices

49. On May 20, 2005, another former trader of Williams Energy Marketing & Trading Company,

Brion Scott McKenna, pled guilty to conspiring with other Williams' traders to provide false natural gas price data to reporting firms, *Inside FERC's Gas Market Report* and *NGI's Bidweek Survey*, from September 2000 to June 30, 2002 for the purpose of manipulating published index prices of natural gas in the West Coast, East Coast, Gulf Coast and Rocky Mountain regions of the United States. Mr. McKenna admitted in his Plea Agreement to successfully manipulating the index prices of natural gas on February 1, 2001 at the following locations: Columbia Gas Transmission Corp. at Appalachia; Florida Gas Transmission Co. pipeline at Zones 2 and 3; Natural Gas Pipeline Co. of America pipeline at Louisiana; Transcontinental Gas Pipeline Corp. at Zone 2; and Transco Zone 6 Market Center. Mr. McKenna admitted in his Plea Agreement that by reporting false trades, he intended to influence the price published by *Inside FERC* and *NGI* at each location for which he reported, and to the extent that his false trade information was included in the respective index calculations, the published index prices did not reflect the legitimate forces of supply and demand. Mr. McKenna admitted that most of the trades he reported were deliberately fabricated, and that he would routinely circulate a spreadsheet containing fictitious trades for input from other traders.

50. In February 2006, Williams Power Company, Inc. agreed to pay $50 million to the Justice Department to settle claims relating to its artificially jacking up natural gas prices in 2000 and 2001. In its agreement with the Justice Department, Williams Power Company, Inc. acknowledged

responsibility for the actions of its former employees in its energy trading operation.

51. In 2006 Williams Power Company, Inc. also agreed to pay $290 million to resolve a class action lawsuit alleging that the company improperly booked millions of dollars in profits for its energy marketing and trading division during the Relevant Time Period.

52. In 2006 Williams Power Company, Inc.'s former trader and operations manager Daryl Brown pleaded guilty in connection with a scheme to manipulate prices. Brown pleaded guilty to one count of manipulation of the price of a commodity in interstate commerce in violation of the Commodity Exchange Act, admitting that throughout the Relevant Time Period he conspired to report false trades to Platts' *Inside FERC's Gas Market Report* and to NGI's *Bidweek Survey* in order to affect published indexes.

The Duke Entities: Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) and Duke Energy Trading and Marketing Company, L.L.C.

53. Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) is a North Carolina corporation with its principal place of business in Charlotte, North Carolina. During all relevant times Duke Energy Corporation wholly owned and controlled its subsidiary, Duke Energy Trading and Marketing Company, L.L.C., a Delaware limited liability corporation with its principal place of business in Houston, Texas. Duke Energy Corporation wholly owned and controlled Duke Energy Trading and

Marketing Company, L.L.C., and other affiliates that regularly sold natural gas consumed in Wisconsin, and to Wisconsin businesses.

54. Duke Energy Corporation directly and through affiliates it dominated and controlled, made arrangements, contracts, and agreements, and entered into a combination and conspiracy with the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Duke Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Duke Energy Corporation, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officers or directors agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, Duke Energy Corporation's officers or directors made strategic marketing policies and decisions concerning

natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as Duke Energy Trading and Marketing Company, L.L.C., in the United States and in Wisconsin.

55. Duke Energy Trading and Marketing Company, L.L.C. is a Delaware limited liability corporation registered as a foreign corporation in Wisconsin, with its principal place of business in Houston, Texas. Duke Energy Trading and Marketing Company, L.L.C. is wholly owned and controlled by its parent, Duke Energy Corporation, a Delaware corporation with its principal place of business in Charlotte, North Carolina. Duke Energy Trading and Marketing Company, L.L.C. marketed natural gas to customers across North America. Duke Energy Trading and Marketing Company, L.L.C. is wholly owned and controlled by Duke Energy Corporation concerning both the conduct of its business relating to the Wisconsin market and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, and combination and conspiracy among and between the Defendants, various Duke entities, and others. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, one or more officers or directors of Duke Energy Corporation made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for

use in the calculation of natural gas price indices that affected the market prices of natural gas which Duke Energy Trading and Marketing Company, L.L.C. sold in Wisconsin and elsewhere. Duke Energy Trading and Marketing Company, L.L.C. buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

56. In February 2005, the Commodity Futures Trading Commission filed a civil action in the United States District Court for the Southern District of Texas, against Michael Whitney, a former energy trader of Duke Energy Trading and Marketing Company, alleging that Whitney submitted or caused to be submitted false or misleading or knowingly inaccurate price and volume information to *Gas Daily* and other price compilers, concerning natural gas transactions which he executed between June 2001 and August 2002.

57. In February 2005, pursuant to a grand jury investigation the United States indicted former Duke executives Timothy Kramer and Todd Reid on 20 counts of conspiracy, circumvention of controls and falsification of books, wire fraud, violation of honest services act, and mail fraud relating to natural gas trades occurring during the Relevant Time Period. Timothy Kramer was Vice President of Financial Portfolio Management for Duke Energy and an officer of Duke Energy Trading and Marketing Company, L.L.C., and several other Duke Energy subsidiaries. Todd Reid was Senior Vice President of Duke Energy Trading and Marketing Company, L.L.C., and also an officer of several other

subsidiaries of Duke Energy. During the Relevant Time Period, Kramer and Reid engaged in what was known as a "round trip trades" or "sleeve trades," which are pre-arranged transactions involving natural gas contracts whereby there is a simultaneous purchase and sale of natural gas between the same parties, for the same volume and term, at the same price, with no contemplation of the payment of money by either party. For the year 2001, a year in which Kramer and Reid made numerous round trip and sleeve trades, Duke Energy paid bonuses (in cash and in Duke Energy stock) of $5,000,000 to Reid and $4,000,000 to Kramer. The indictment indicates that from March 2001 to August 2002, Kramer and Reid knowingly did combine, conspire and agree with each other and other unknown persons to commit wire fraud, and that as part of their conspiracy between themselves and other unknown persons they caused the execution of over 500 false round trip natural gas trades. The precise identity of the unknown persons who conspired and agreed with Kramer and Reid is unknown to the plaintiffs, but on information and belief, they are the Defendants and the non-defendant co-conspirators named herein. In large part based on Kramer and Reid's actions, Duke Energy's earnings for the last three quarters of 2001 and first quarter of 2002 overstated earnings by approximately $54 million.

58. Duke Energy Carolinas, LLC (f/k/a Duke Energy Corporation) is liable for the debts and obligations of its wholly owned subsidiary Duke Energy Trading and Marketing Company, L.L.C. Throughout the Relevant Time Period, Duke Energy

Corporation was aware of the illegal behavior being engaged in by its subsidiary, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding hundreds of millions of dollars in profits from its subsidiary to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on April 11, 2003, Duke Energy Corporation's President and CEO Fred Fowler announced the closing of all Duke proprietary trading groups. On information and belief, the way in which the subsidiary was created and capitalized, and the parent company's moves discontinuing operations, and relating to discontinuing operations, have left the subsidiary with insufficient assets to pay the judgment that was foreseeable when Duke Energy Corporation first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

59. In September 2003, Duke Energy Corporation and Duke Energy Trading and Marketing, L.L.C. paid $28 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices

The Dynegy Entities: Dynegy Illinois Inc. (f/k/a Dynegy Inc.), Dynegy GP Inc., DMT GP. L.L.C. (successor to DMT Holdings, L.P.), and Dynegy Marketing & Trade

60. Dynegy Illinois Inc. (f/k/a Dynegy Inc.) is an Illinois corporation in good standing with its principle place of business in Houston, Texas. Dynegy Illinois Inc. wholly owns and controls

Dynegy Marketing & Trade, a Colorado general partnership in good standing with its principal place of business in Houston, Texas. Dynegy Marketing & Trade is wholly owned and controlled by its general partners, Dynegy GP Inc. and DMT GP., L.L.C. (successor to DMT Holdings, L.P.). Dynegy Marketing & Trade was one of the largest natural gas marketers in the United States and in 2001, Dynegy Marketing & Trade's natural gas sales averaged 8.2 billion cubic feet per day. Dynegy Marketing & Trade regularly conducted business in Wisconsin during the Relevant Time Period.

61. Dynegy Marketing & Trade made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Dynegy Marketing & Trade's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Dynegy Marketing & Trade, either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officers or directors, such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, agreed

to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, Dynegy Marketing & Trade's officers or directors, such as Stephan W. Bergstrom and Dan W. Ryser, and employees, such as Michelle Valencia, a former senior trader, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Dynegy Marketing & Trade sold in Wisconsin and elsewhere, and those policies and decisions were implemented on an operational level by Dynegy Marketing & Trade's employees.

62. On September 25, 2002, Dynegy announced that 15 of its employees had engaged in reporting false data to price compilers. Dynegy Marketing & Trade's employees have stated the manner by which they reported trades to industry publications was similar to the way in which it was done at their previous companies, and that this illegal practice was "common practice in the industry" during the Relevant Time Period.

63. In July 2005, acting on the results of a grand jury investigation, the United States indicted former Dynegy Marketing & Trade natural gas trader

Michelle Marie Valencia and former El Paso Corporation trader Greg Singleton, alleging that they—in conspiracy with each other and with other unknown persons—made numerous false reports of natural gas trades to index publishers. The precise identity of the other unknown persons who were involved in the conspiracy are currently unknown to the plaintiffs, but on information and belief, they are the Defendants or the non-defendant co-conspirators named herein. The indictment of Valencia and Singleton indicates that the false information they reported to publications affected and tended to affect index prices, and thereby the price of natural gas in countless transactions all across the United States, which potentially cost consumers of natural gas great sums of money. As part of the conspiracy alleged in the indictment, Singleton and Valencia discussed what trades they did and did not intend to report to index publications, they agreed to report at least one trade between El Paso and Dynegy that was not real, they agreed not to report one or more natural gas trades between Dynegy and El Paso that were in fact real trades, and they caused other employees of Dynegy and El Paso to report fictitious gas trades to *NGI* and *Inside FERC*. In a second superseding indictment relating to Valencia filed in March 2006, the United States alleged that when Valencia reported false information to *Inside FERC* and *Natural Gas Intelligence* in 2000 and 2001, she affected and tended to affect index prices, and thereby the price of natural gas paid by consumers. In August 2006, Valencia of Dynegy was convicted of seven counts of wire fraud relating to reporting false natural gas trades, and Singleton of El Paso was

convicted of a count of wire fraud relating to reporting false natural gas trades.

64. In December, 2002, Dynegy Marketing & Trade and West Coast Power LLC, paid $5 million in civil penalties to the United States Commodity Future Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. The charges included that Dynegy Marketing & Trade and West Coast Power LLC conspired together to report false offsetting trades. By reporting offsetting trades, the companies intended to make their false trades look more believable to the index publishers.

65. Dynegy Illinois Inc. (f/k/a Dynegy Inc.) is liable for the debts and obligations of its wholly owned and controlled subsidiaries Dynegy GP Inc., DMT GP., L.L.C. (successor to DMT Holdings, L.P.) and Dynegy Marketing & Trade. Throughout the Relevant Time Period, Dynegy Illinois Inc. was aware of the illegal behavior being engaged in by its subsidiaries, had the power to and could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding millions of dollars in profits from its subsidiaries to its consolidated financials. Shortly after the subsidiary's illegal behavior became public, on October 16, 2002, Dynegy Illinois Inc.'s interim CEO Dan Dienstbier announced that Dynegy Illinois Inc. was abandoning its merchant energy operation. On information and belief, the way in which the subsidiary was created and capitalized, and the moves relating to discontinuing its operations, have left the subsidiary with insufficient assets to pay the

judgment that was foreseeable when Dynegy Illinois Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiary.

The El Paso Entities: El Paso Corporation and El Paso Marketing, L.P. (f/k/a El Paso Merchant Energy, L.P.)

66. El Paso Corporation is a Delaware corporation in good standing with its principal place of business in Houston, Texas. El Paso consistently described itself during the Relevant Time Period as North America's leading provider of natural gas services. El Paso Corporation wholly owns and controls its subsidiary, El Paso Marketing, L.P. (f/k/a El Paso Merchant Energy, L.P.), a Delaware limited partnership with its principal place of business in Houston, Texas. El Paso Corporation buys, sells, stores, and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

67. El Paso Corporation directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. El Paso Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period El Paso Corporation, either

directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officers or directors, such as Ralph Eads, Executive Vice President of El Paso, agreed to arrangements, contracts, agreements, and to a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, El Paso Corporation's officers or directors, such as Ralph Eads, Executive Vice President, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates, such as El Paso Merchant Energy, L.P., in the United States and in Wisconsin.

68. El Paso Merchant Energy, L.P. is a Delaware limited partnership with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is wholly owned and controlled by its parent company, El Paso Corporation, a Delaware corporation with its principal place of business in Houston, Texas. El Paso Merchant Energy, L.P. is

wholly owned and controlled by El Paso Corporation concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, combination and conspiracy among and between Defendants, various El Paso entities, and others. During the Relevant Time Period and in furtherance of these unlawful agreements, officers or directors of El Paso Corporation, such as Ralph Eads, Executive Vice President of El Paso Corporation and President of El Paso's Merchant Energy Group, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which El Paso Merchant Energy, LP. sold in Wisconsin and elsewhere. El Paso Merchant Energy, L.P. buys, sells and transports natural gas, including its own or its affiliates' production, in the United States and in Wisconsin.

69. In March 2003, El Paso Corporation and El Paso Merchant Energy, L.P., paid $20 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

70. In November 2004, three former natural gas traders of El Paso Merchant Energy, L.P., Donald E. Burwell, James P. Phillips, and Greg Singleton, were charged by the United States Department of Justice, U.S. Attorney's Office for the Southern District of Texas, based on a grand jury indictment, with

conspiracy, false reporting, and wire fraud related to the transmission of allegedly inaccurate trade reports to industry price compilers which used the reported trades to calculate the index price of natural gas. El Paso trader Todd Geiger was sentenced to two years in federal prison following his conviction for reporting false information related to natural gas trades. El Paso trader Donald E. Burwell pled guilty in February 2006, to false reporting of natural gas trades. In the indictment relating to Burwell the grand jury charged that he and other traders with whom he combined, conspired and agreed reported false trading information, which affected index prices, and thereby, the price of natural gas in countless transactions around the country, and potentially cost consumers of natural gas great sums of money.

71. In July 2005, acting on a grand jury investigation, the United States indicted former El Paso Corporation trader Greg Singleton, along with former Dynegy Marketing & Trade natural gas trader Michelle Marie Valencia, alleging that during the Relevant Time Period they engaged in a conspiracy—with each other and with other unknown persons—to make numerous false reports of natural gas trades to index publishers. The precise identities of the other unknown persons who were involved in the conspiracy are currently unknown to the plaintiffs, but on information and belief, they are the Defendants or the non-defendant co-conspirators named herein. Their indictment indicates that the false information they reported to publications affected and tended to affect index prices, and thereby the price of natural gas in

countless transactions all across the United States, which potentially cost consumers of natural gas great sums of money. As part of the conspiracy alleged in the indictment, they discussed what trades they did and did not intend to report to index publications, they agreed to report at least one trade between El Paso and Dynegy that was not real, they agreed not to report one or more natural gas trades between Dynegy and El Paso that were in fact real trades, and they caused other employees of Dynegy and El Paso to report fictitious gas trades to *NGI* and *Inside FERC*. In August 2006, Valencia of Dynegy was convicted of seven counts of wire fraud relating to reporting false natural gas trades, and Singleton of El Paso was convicted of a count of wire fraud relating to reporting false natural gas trades.

72. In December 2003, El Paso trader Todd Geiger, a former vice president of El Paso, pled guilty to reporting 48 fake trades in November 2003 to the publication *Inside FERC*. Geiger admitted in court that he knew the trades were false and that the index was used to price natural gas. In October 2004, four former El Paso Corporation natural gas traders (Christopher Bakkenist, Donald Guilbault, William Ham and Dallas Dean) each pleaded guilty to making false reports used to calculate the index price of natural gas during the Relevant Time Period.

The Reliant Entities: Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), Reliant Energy Services, Inc., and CenterPoint Energy Services, Inc. (f/k/a "Reliant Energy Retail, Inc.")

73. Reliant Energy, Inc. is a Delaware corporation in good standing with it principal place of business in Houston, Texas. Reliant Energy, Inc. changed its name from Reliant Resources, Inc. in April 2004. Reliant Resources Inc. was created as a subsidiary of Reliant Energy Incorporated sometime after 1999 in order to comply with the passage of the Texas Electric Choice Act, which required Reliant Energy Incorporated to split its regulated and unregulated businesses. The end result of that effort was that Reliant Energy Incorporated's business was split between Reliant Energy, Inc. and CenterPoint Energy, Inc., which process was completed in October 2002. Prior to the split and during the Relevant Time Period, Reliant Energy, Inc. f/k/a Reliant Resources Inc. and CenterPoint Energy Services, Inc., f/k/a Reliant Energy Retail, Inc., were wholly owned and controlled subsidiaries of Reliant Energy, Incorporated. Reliant Energy, Inc., f/k/a Reliant Resources, Inc., is the successor in liability from Reliant Energy Incorporated. Reliant Energy, Inc., f/k/a Reliant Resources, Inc. wholly owned and controlled its subsidiary Reliant Energy Services, Inc. during the Relevant Time Period, a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc., buys, sells, and transports natural gas in the United States and in Wisconsin.

74. Reliant Energy, Inc., f/k/a Reliant Resources, Inc., directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy with the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Reliant Energy, Inc., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s officers or directors, such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s officers or directors,

such as Joe Bob Perkins, Executive Vice President and Group President, Wholesale Businesses in 2000 and 2001, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as Reliant Energy Services, Inc.

75. Reliant Energy Services, Inc. is a Delaware corporation registered as a foreign corporation in good standing in Wisconsin during the Relevant Time Period with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly owned and controlled during the Relevant Time Period by its parent, Reliant Energy, Inc., f/k/a Reliant Resources, Inc., a Delaware corporation with its principal place of business in Houston, Texas. Reliant Energy Services, Inc. is wholly owned and controlled by Reliant Resources, Inc. concerning both the conduct of it business generally within Wisconsin and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, and combination and conspiracy among and between the Defendants, various Reliant entities, and others. Reliant Energy Services, Inc. buys, sells, and transports natural gas in the United States and in Wisconsin. On information and belief, during the Relevant Time Period, Reliant Energy Services, Inc. sold natural gas to many members of the class, both itself and through middlemen, for use in Wisconsin.

76. In November 2003, Reliant Energy Services, Inc. paid an $18 million civil penalty to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices, including charges of wash sales. The precise identities of the other parties that engaged in wash sales transactions with Reliant are currently unknown to the plaintiffs, but on information and belief are the other Defendants in this action and the non-defendant co-conspirators named below.

77. In November 2004, a former natural gas trader of Reliant Energy Services, Inc., Jerry A. Futch, was charged by the United States Department of Justice, U.S. Attorney's Office in the Southern District of Texas, based on a grand jury indictment for reporting false trades in 2000 and 2001 to industry price compilers which used the reported trades to calculate *Inside FERC*'s index price of natural gas. In 2005, Futch pled guilty to one count of delivering knowingly inaccurate reports concerning market information that affected and tended to affect the price of natural gas in interstate commerce.

78. Reliant Energy, Inc. (f/k/a Reliant Resources, Inc.), is liable for the debts and obligations of its wholly owned and controlled subsidiary Reliant Energy Services, Inc. and for the actions of CenterPoint Energy Services, Inc. (f/k/a Reliant Energy Retail, Inc.) during the relevant time period. Throughout the Relevant Time Period, Reliant Energy, Inc. was aware of the illegal behavior being engaged in by its subsidiaries, had the power to and

could have prevented the illegal behavior, and did nothing to stop the illegal behavior, while at the same time adding millions of dollars in profits from its subsidiaries to its consolidated financials. On information and belief, the way in which the subsidiaries were created and capitalized, and the parent company's moves relating to discontinuing operations, has left the subsidiaries with insufficient assets to pay the judgment that was foreseeable when Reliant Energy Inc. first became aware of, or should have become aware of, the illegal behavior engaged in by its subsidiaries.

79. CenterPoint Energy Services, Inc., f/k/a Reliant Energy Retail, Inc., is a corporation organized and existing under the laws of the State of Delaware, registered to do business in the State of Wisconsin, with its principal place of business located at 1111 Louisiana, Houston, Texas. CenterPoint Energy Services, Inc. was formerly known as CenterPoint Energy Marketing, Inc., CenterPoint Energy Gas Services, Inc., and Reliant Energy Retail, Inc. During the Relevant Time Period, CenterPoint Energy Services, Inc. was a wholly owned subsidiary of Reliant Energy, Incorporated and sold natural gas at unlawfully inflated prices directly to the plaintiff Ladish Co., Inc. for use in Wisconsin, and to many other members of the class, both itself and through middlemen.

Coral Energy Resources, L.P.

80. Coral Energy Resources, L.P. is a Delaware limited partnership in good standing with its principal place of business in Houston, Texas. Coral

Energy Resources, L.P. is wholly owned and controlled by Coral Energy Holdings, L.P., and is an affiliate of Shell Oil Company, and Shell Trading Gas and Power Company. Coral Energy Resources, L.P. was one of the largest natural gas marketers in the United States and conducted natural gas marketing operations at eastern and western power and natural gas trading hubs for the Eastern and Western United States during the Relevant Time Period. Coral Energy Resources sells 100% of its parent companies' natural gas production. Coral Energy Resources, L.P. regularly conducts business in Wisconsin. Coral Energy Resources, L.P. entered into a long term GISB natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.

81. Coral Energy Resources, L.P. made arrangements, contracts, and agreements, and entered into a combination and conspiracy with the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Coral Energy Resources, L.P.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period. On information and belief, during the Relevant Time Period Coral Energy Resources, L.P., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of

false trading information. In furtherance of the unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officers, directors and/or employees agreed to arrangements, contracts, agreements, and a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas that its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, Coral Energy Resources, L.P.'s officers, directors, and/or employees made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Coral Energy Resources, L.P. sold in Wisconsin and elsewhere, and those policies and decisions were implemented on an operational level by Coral Energy Resources, L.P.'s employees in the United States and in Wisconsin.

82. In July 2004, Coral Energy Resources, L.P. paid $30 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices. In March 2005, Coral Energy Resources, L.P. agreed to pay $3.5 million to resolve a dispute with the CFTC regarding whether it had sufficiently investigated, or accurately reported the results of its investigation, into trader false reporting of trades to index

publishers during the Relevant Time Period. On information and belief, Coral and its affiliates engaged in nearly 150 wash trades during the Relevant Time Period.

83. In February 2005 the CFTC filed federal civil injunction actions against Dennette Johnson, Courtney Cubbison Moore, Robert Harp, Anthony Dizona, John Tracy and Kelly Dyer—all employees or former employees of Shell Trading Gas and Power Company—seeking to bar their attempting to manipulate the price of natural gas in interstate commerce by reporting biased information to price reporting companies. Johnson, Moore, Harp, Dizona, Tracy and Dyer would regularly circulate an e-mail with directions to the traders to report prices in such a way that it would benefit either the positions of Shell Trading Gas and Power Company or Coral Energy Resources, L.P., to which the traders at Shell Trading Gas and Power Company provided services. This was done with the intent to manipulate prices during the Relevant Time Period. Further details regarding the conspiracy are set forth in *U.S. Commodity Futures Trading Commission v. Johnson*, 408 F. Supp.2d 259 (S.D. Tex. 2005) (decision denying defendants' motion to dismiss).

a. The Xcel Entities: Xcel Energy, Inc., E prime Inc. and Northern States Power Company

84. Xcel Energy, Inc., is a Minnesota corporation in good standing with its principal place of business in Minneapolis, Minnesota. Xcel Energy, Inc., wholly owned and controlled during the Relevant Time Period its subsidiary, E prime Inc., a Colorado

corporation with its principal place of business in Denver, Colorado, its subsidiary Northern States Power Company, a Wisconsin corporation with its principal place of business in Eau Claire, Wisconsin, and NRG Energy, Inc., a Delaware corporation with its principal place of business in Minneapolis, Minnesota. Xcel Energy, Inc., and its affiliates or divisions engaged in energy marketing and trading, and transportation, storage, and marketing of natural gas in Wisconsin during the Relevant Time Period.

85. Xcel Energy, Inc., during the Relevant Time Period was one of the largest power companies in the United States. Xcel Energy, Inc. directly and through affiliates it owns and controls, made arrangements, contracts, and agreements, and entered into a combination and conspiracy with the Defendants and other co-conspirators which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas. Xcel Energy, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin, during the Relevant Time Period. On information and belief, during the Relevant Time Period Xcel Energy, Inc., either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information. In furtherance of such unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officers or directors, agreed to arrangements, contracts, agreements, and

a combination and conspiracy which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas which its affiliates sold in the United States and in Wisconsin. During the Relevant Time Period and in furtherance of these unlawful arrangements, contracts, agreements, and combination and conspiracy, Xcel Energy, Inc.'s officers or directors, made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which was sold, and those policies and decisions were implemented on an operational level by affiliates, such as E prime Inc., in the United States and in Wisconsin.

86. During the Relevant Time Period, Xcel Energy, Inc. owned and controlled NRG Energy, Inc. ("NRG"). NRG was formed in 1992 as a subsidiary of Northern States Power, which in 2000 was merged into New Century Energies, Inc., to form Xcel Energy, Inc. In 2001, NRG was one of the largest power companies worldwide, and sold natural gas to companies located in Wisconsin. In 2003, NRG commenced voluntary petitions under Chapter 11 of the bankruptcy code, and in November 2003, the bankruptcy court entered an order confirming NRG's plan of reorganization. From at least August 2001 through May 2002 (*i.e.*, during the time NRG was owned and controlled by Xcel Energy, Inc.), NRG traders knowingly delivered false trade reports to price index compilers such as *Gas Daily* for the purpose of influencing the price of natural gas in

interstate commerce. In July 2004, the CFTC commenced an action against NRG seeking a permanent injunction precluding NRG from making false trade reports.

87. E prime Inc. is a Colorado corporation in good standing with its principal place of business in Denver, Colorado. E prime Inc. is wholly owned and controlled by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. E prime Inc. is wholly owned and controlled by Xcel Energy, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, combination and conspiracy among and between Xcel Energy, E prime Inc., and others. During the Relevant Time Period and in furtherance of these unlawful agreements, officers or directors of Xcel Energy, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which E prime Inc. sold in Wisconsin and elsewhere. E prime Inc. provided during the Relevant Time Period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States and in Wisconsin.

88. In January 2004, Xcel Energy, Inc., and E prime Inc., paid $16 million in civil penalties to the United States Commodity Futures Trading

Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

89. Northern States Power Company is a Wisconsin corporation with its principal place of business in Eau Claire Wisconsin. Northern States Power Company is wholly owned and controlled by its parent company, Xcel Energy, Inc., a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Northern States Power Company is wholly owned and controlled by Xcel Energy, Inc., concerning both the conduct of its business generally within Wisconsin and in particular its conduct in furtherance of the unlawful arrangements, contracts, agreements, combination and conspiracy among and between Defendants, Xcel Energy, Northern States Power Company, and others. During the Relevant Time Period and in furtherance of these unlawful agreements, officers or directors of Xcel Energy, Inc., made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas which Northern States Power Company sold in Wisconsin and elsewhere. Northern States Power Company provided during the Relevant Time Period natural gas marketing, storage and risk management services to industrial, commercial, and utility energy users and also engaged in energy trading in the United States and in Wisconsin.

90. In January 2004, Northern States Power Company affiliated companies Xcel Energy, Inc., and

E prime Inc., paid $16 million in civil penalties to the United States Commodity Futures Trading Commission to settle charges of false reporting and attempted manipulation of natural gas prices.

ALLEGATIONS COMMON TO ALL DEFENDANTS AND CO-CONSPIRATORS

91. The unlawful arrangements, contracts, agreements, combination and conspiracy set forth in this Complaint have been committed by Defendants, the named co-conspirators, and others and were ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of Defendants' business or affairs. At least by the summer of 2000, by their marketplace behavior and agreement as to pricing, Defendants and the named and unnamed co-conspirators began and worked together to fraudulently increase the retail price of natural gas paid by commercial entities in Wisconsin. This fraudulent agreement is evidenced by, among other things, the daily exchange of price information by and among Defendants and the co-conspirators and the use of computer software programs and websites (including Enron Online) by Defendants and the co-conspirators, to collusively and artificially inflate the retail price of natural gas paid by commercial entities in Wisconsin. Traders at the Defendants and the co-conspirators knew during the Relevant Time Period that price information being posted on Enron Online was inaccurate information, and rather than disregard that information, or report the inaccuracies, the traders went along with Enron's

inaccurate price postings, frequently passed along those inaccurate postings to price index publishers, and themselves reported new inaccurate trade information to the publishers of indices so as to manipulate market prices.

92. In September 2002, five major traders and their companies, including defendant CMS Energy, and co-conspirators American Electric Power Company, Inc., AEP Energy Services, Inc., Dynegy Marketing & Trade, Williams Energy Marketing & Trading, and El Paso Merchant Energy, L.P., admitted that they provided falsified information to *Gas Daily* and *Inside FERC*. The purpose and effect of these actions was to collusively and artificially inflate the price of natural gas paid by commercial entities in the United States and Wisconsin above competitive levels, forcing commercial entity natural gas consumers in Wisconsin to pay much more for natural gas than they should have paid.

93. Upon information and belief, Defendants and co-conspirators were in regular and virtually continuous contact with one another, including regular and extremely frequent communications with respect to the spot price of natural gas and natural gas futures contracts.

94. Traders overstated prices to the reporting firms, which in turn published price data that incorporate the overstated prices. This pervasive false reporting in the natural gas market fed into the marketplace over and over again.

95. Defendants and the co-conspirators, directly or through their subsidiaries, affiliates, or agents,

planned and executed a scheme designed to cause price instability and increase volatility in spot prices and thereby manipulate the price of natural gas futures. Defendants' unlawful conduct produced exorbitant illegal profits.

96. According to the CFTC, Platts' published indices had a financial impact upon billions of dollars worth of natural gas transactions during the Relevant Time Period. Between November 2000 and October 2002, more than three-quarters of the trades the Defendants and co-conspirators submitted to Platts were knowingly false or misleading.

97. Not all companies in the natural gas industry engaged in the illegal behavior in which the Defendants engaged during the Relevant Time Period. For instance, on information and belief, BP Energy Company was a major trader of natural gas in the United States during the Relevant Time Period, and established an effective program that ensured that the trading reports that BP Energy Company provided to publishers of price indices were accurate. The illegal behavior engaged in by the Defendants was neither inevitable, nor natural, but was instead the result of a conscious decision by the Defendants and the co-conspirators to collusively manipulate the markets to their advantage.

98. The behavior engaged in by the Defendants and the co-conspirators that forms the basis of this suit was not routine business behavior, but was instead highly illegal behavior that has resulted in the criminal conviction or indictment of numerous industry insiders. This illegal behavior, and the hundreds of millions of dollars in lucre that has

flowed to the Defendants and their co-conspirators during the Relevant Time Period due to their engaging and permitting this illegal behavior, was only possible because the Defendants and co-conspirators agreed to report false, inaccurate, or misleading information to the industry publications and newsletters identified above, and to structure their contracts such that those contracts were pegged to the false reports contained in those publications and newsletters. It was known in the natural gas producing and trading industry that these markets were susceptible to manipulation, and the Defendants and their co-conspirators avoided taking steps to ensure that effective compliance and reporting programs were in place to prevent false reporting from occurring. Traders and executives of Defendants and the co-conspirators knew prior to the Relevant Time Period that false reporting could occur, knew early in the Relevant Time Period that Enron and many traders throughout the industry were engaging in false reporting, and rather than reporting such, or resisting such, agreed to go along with the practice, which caused substantial damages to the plaintiff class in this case.

99. Various other persons, entities, companies and corporations not named as defendants and not explicitly named as co-conspirators participated as co-conspirators with Defendants in the violations alleged herein and have made statements and performed acts in furtherance of those violations in the United States and elsewhere that had a direct, substantial, and reasonably foreseeable effect on commerce in Wisconsin. The other co-conspirators include, but are not limited to, Enron Energy

Services, Inc. and Enron Power Marketing, Inc., which paid a $35 million civil penalty (May 2004) to the CFTC; Aquila Merchant Services, Inc., which paid a $26,500,000 civil penalty (June 2004) to the CFTC; Calpine Energy Services, L.P., which paid a $1.5 million civil penalty (January 2004) to the CFTC; Cinergy Marketing & Trading, LP, which paid a $3 million civil penalty (November 2004) to the CFTC; Dominion Resources, Inc., which paid a $4.25 million civil penalty (September 2006) to the CFTC; Entergy Koch Trading L.P., which paid $3 million civil penalty (January 2004) to the CFTC; WD Energy Services Inc., f/k/a EnCana Energy Services, Inc., which paid a $20 million civil penalty (July 2003) to the CFTC; Enserco Energy, Inc., which paid a $3 million civil penalty (July 2003) to the CFTC; Entergy Koch Trading, L.P., which paid a $3 million civil penalty (January 2004) to the CFTC; Mirant Americas Energy Marketing, L.P., which paid a $12.5 million civil penalty (December 2004) to the CFTC; NRG Energy, Inc.; Western Gas Resources, Inc., which paid a $7 million civil penalty (July 2004) to the CFTC; Sempra Energy, including affiliate Sempra Energy Trading, and their respective officers, directors, and employees.

100. Traders at Mirant Energy Marketing, L.P. conspired with one or more traders at Cinergy Corporation to make false reports of trades to market reporters so as to manipulate prices during the time period from January 2000 to early 2001. Specifically, Michael Whalen (a trader with Cinergy) had a telephone conversation with Christopher McDonald (a trader with Americas Energy Marketing, L.P.), wherein they conspired about how

they should report false trades to *Inside FERC* to manipulate market prices, and how to make such reports believable, with Whalen saying to McDonald "hey, do you want to fax me . . . exactly what you guys are going to write down so its more believable . . . I'll just write the exact opposite." These actions lead the CFTC to file a civil federal injunctive action against Whalen and McDonald and other traders at Mirant.

101. In another example, between May 2000 and October 2002, Matthew Reed, Darrell Danyluk and Shawn McLaughlin engaged in false reporting and attempted manipulation of natural gas prices while employed by Enserco Energy Services. Reed continued to engage in coordinated false reporting after he left Enserco, and became a trader at Concord Energy LLC. While at Enserco, Reed in Colorado and Danyluk in Calgary coordinated on an almost daily basis how they wanted to report fictitious trades to numerous reporting firms, including *Gas Daily*, and *National Gas Intelligence*. Reed and Danyluk called this their "double dipping" scheme and perpetrated their scheme on reporting firms by portraying the Colorado and Calgary offices as separate trading operations when they were not. These actions lead the CFTC to file a civil federal injunctive action against Reed, Danyluk, McLaughlin and Concord Energy, LLC in February 2005.

102. While each of the two causes of action stated in this complaint are distinct and separate causes of action—with different elements and different available remedies—under each cause of action the

plaintiffs allege that the Defendants engaged in a conspiracy to manipulate prices as prohibited by Wis. Stat. § 133.03. As stated in further detail above and below, the Defendants and their co-conspirators during the Relevant Time Period did the following:

a. The Defendants and their co-conspirators engaged in "wash sales." A "wash sale" is an agreement by which Company A would agree with Company B that Company A would agree to sell a certain amount of natural gas at a certain price to Company B, and that in return Company B would sell roughly the same amount of natural gas at roughly the some price to Company A. By doing this, Company A and Company B would create the illusion of higher demand, and a higher volume of sales, in the market place, and would thus achieve their objective of increasing or otherwise manipulate the price of natural gas sold in interstate commerce.

b. The Defendants and their co-conspirators agreed with each other to make, and knowingly made, false, inaccurate, or misleading reports of natural gas trades to trade publications (such as *Gas Daily* and *Inside FERC*), knowing that those publications use those reports to report market prices and volumes, and knowing that by doing such they could manipulate markets to the detriment of natural gas buyers.

c. The Defendants and their co-conspirators through the actions of their employees

violated numerous criminal statutes which prohibit wash trades and which prohibit the false or inaccurate reporting of market information.

d. The illegal, criminal behavior of the Defendants and their co-conspirators was widespread in the industry, and was well known to be occurring by traders in the industry throughout the Relevant Time Period.

RELEVANT STATUTORY SECTIONS

103. This case involves the following four sections in Wisconsin's Antitrust Statute (Wis. Stat. ch. 133): §§ 133.01, 133.03, 133.14 and 133.18.

104. Wis. Stat. § 133.01 provides:

Legislative intent.

The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated

industry consistent with the other public interest goals established by the legislature.

105. Wis. Stat. § 133.03 provides:

Unlawful contracts; conspiracies.

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal.

106. Wisconsin's "Full Consideration Antitrust Statute, Wis. Stat. § 133.14, provides:

Illegal contracts void; recovery.

All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by § 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

107. Wisconsin's "Treble Damages Antitrust Statute," Wis. Stat. § 133.18, in relevant part provides:

(1) . . . [A]ny person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefore and shall recover threefold the

damages sustained by the person and the cost of the suit, including reasonable attorney fees.

108. Finally, Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, provides: "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Additionally, 28 U.S.C. § 2201 provides "[A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

109. Plaintiffs discovered the facts constituting their causes of action under Wis. Stat. ch. 133 less than six years before the filing of this action. For this reason, among others, this complaint is timely pursuant to Wis. Stat. § 133.18.

CLASS ACTION

110. Plaintiffs bring this action both on behalf of themselves and on behalf of a class consisting of all industrial and commercial purchasers of natural gas for their own use or consumption during the Relevant Time Period, and which gas was used or consumed by them in Wisconsin. Excluded from the Class are (a) entities that purchased natural gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) entities that purchased natural gas from entities that sold natural gas at rates approved by the

Wisconsin Public Service Commission (to the extent of such purchases at such approved rates); (d) defendants and their predecessors, affiliates and subsidiaries; and (e) the federal government and its agencies.

111. The plaintiffs further request that in the order by which the Court certifies the class, that the Court in include in that order a certification of the following two subclasses: (1) a subclass comprised of all direct purchasers in the class, and (2) a subclass of all indirect purchasers in the class.

112. The plaintiffs further request that Ladish Co., Inc., Arandell Corporation, Briggs & Stratton Corporation, and Carthage College be designated as the representatives of the direct purchaser subclass, and that plaintiffs Merrick's, Inc. and Sargento Foods Inc. be designated as the representatives of the indirect purchaser subclass.

113. This action is brought and may be properly maintained as a class action pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3).

114. Plaintiffs do not know the exact size of the class. However, based upon the nature of the trade and commerce involved, plaintiffs believe that the total number of class members is substantial, and that class members are geographically dispersed throughout Wisconsin. Therefore, joinder of all members of the class is not practicable.

115. There exist questions of common and general interest to all members of the class, including, but not limited to: (a) whether the Defendants engaged

in a conspiracy in violation of Wis. Stat. § 133.03; (b) whether the plaintiffs and those Wisconsin purchasers of natural gas similarly situated are entitled to a "full consideration" recovery pursuant to Wis. Stat. § 133.14; and (c) whether the plaintiffs and those Wisconsin purchasers of natural gas similarly situated are entitled to recover treble damage pursuant to Wis. Stat. § 133.18.

116. Plaintiffs, as representatives of the class, will fairly and adequately protect the interests of the class and have engaged counsel experienced and competent in litigation of this type. The interests of plaintiffs are coincident with, and not antagonistic to, those of the other members of the class.

117. The questions of law and fact common to members of the class predominate over any questions affecting only individual members of the class. Class action treatment is a superior method for the fair and efficient adjudication of the controversy in that, among other things, there is no interest by members of the class in individually controlling the prosecution of separate actions and it is desirable to concentrate the litigation of the claims made herein in a single proceeding in order to provide relatively small claimants with a forum in which to seek redress for this antitrust violation. Whatever difficulties may exist in the management of the class action will be greatly outweighed by the class action procedure, including but not limited to providing claimants with a method for the redress of claims that may not otherwise warrant individual litigation.

118. Moreover, Defendants have acted on grounds generally applicable to the entire class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

COUNT I: WIS. STAT. § 133.14 CLAIM

As and for their first cause of action, the plaintiffs allege as follows:

119. The plaintiffs incorporate by reference the allegations in all of the preceding numbered paragraphs.

120. The plaintiffs are commercial entities (including industrial and institutional entities) that have operations in Wisconsin.

121. During the Relevant Time Period, the plaintiffs entered into agreements to purchase natural gas for use in Wisconsin.

122. During the Relevant Time Period, the Defendants were sellers of natural gas, and entered into contracts or agreements during the Relevant Time Period to sell natural gas for use or resale in Wisconsin.

123. During the Relevant Time Period, the Defendants were members of a conspiracy prohibited by Wis. Stat. § 133.03.

124. While member(s) of a conspiracy prohibited by Wis. Stat. § 133.03, the Defendants made agreements to sell natural gas which was purchased by one or more of the plaintiffs or members of the class, and those agreements either directly or

indirectly were the result of, grew out of or were connected with a violation of Wis. Stat. § 133.03. Specifically, the Defendants during the Relevant Time Period conspired to restrain trade or commerce relating to natural gas, and they received or benefited from the payments made by the plaintiffs pursuant to the plaintiffs' natural gas purchase agreements.

125. The actions of the Defendants and their co-conspirators resulted in the plaintiffs paying inflated prices for natural gas during the Relevant Time Period. During the Relevant Time Period, natural gas prices in Wisconsin more than doubled. The plaintiffs paid higher prices for natural gas than they otherwise would have paid if the conspiracy among Defendants and others had not existed. The actual product around which the conspiracy centered was sold to purchasers in Wisconsin. The conspiracy also injured members of the class in Wisconsin, including the plaintiffs, by among other things, depriving them of the right and ability to make risk management, resource allocation and other financial decisions relating to natural gas, in a full and free competitive market.

126. Because of the conspiracy among Defendants and others violated § 133.03, the contracts or agreements the Defendants entered into during the Relevant Time Period, which contracts or agreements were founded upon, are the result of or which grew out of or is connected with the Defendants' violation of Wis. Stat. § 133.03, are void under the first sentence of Wis. Stat. § 133.14. Furthermore, under the second sentence of Wis.

Stat. § 133.14, the plaintiffs are entitled to recover from the Defendants in this action the payments they made upon, under or pursuant to those void contracts or agreements, which payments were made either directly to any of the Defendants, or to or for the benefit of any defendant, if and as the Defendants benefited from those payments.

COUNT II: WIS. STAT. § 133.18 CLAIM

As and for their second cause of action, the plaintiffs allege as follows:

127. The plaintiffs incorporate by reference the allegations in all of the preceding numbered paragraphs.

128. The Defendants engaged in conduct prohibited by Wis. Stat. ch. 133. Specifically, the Defendants violated Wis. Stat. § 133.03 during the Relevant Time Period by making contracts or engaging in a combination or conspiracy in restraint of trade or commerce relating to natural gas.

129. The plaintiffs were injured, directly or indirectly, by the Defendants' violation of Wis. Stat. § 133.03, in that the plaintiffs paid higher prices for natural gas during the Relevant Time Period than they would have if the Defendants had not violated Wis. Stat. § 133.03. Thus, plaintiffs are entitled to recover treble damages, pursuant to Wis. Stat. § 133.18.

DEMAND FOR JUDGMENT

WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated, demand judgment in their favor and against Defendants as follows:

(1) That the Court certify the class as described herein and permit this action to proceed as a class action with one or more of the plaintiffs named herein as the designated representatives of the class;

(2) A declaration pursuant Wis. Stat. § 133.14, Wis. Stat § 806.04, or 28 U.S.C. § 2201 that the above described contracts and agreements that the Defendants entered into during the Relevant Time Period are void, and further that the Defendants are jointly and severally liable pursuant to Wis. Stat. § 133.14 to the plaintiffs and class members for repayment of the amounts the plaintiffs paid for natural gas during the Relevant Time Period as the Defendants benefited from those payments, in an amount to be determined at trial;

(3) Pursuant to Wis. Stat. § 133.18(1)(a), an award of three times the plaintiffs' and class members' actual damages, in an amount to be determined at trial, reduced after trebling by any amount actually recovered under plaintiffs' and class members' § 133.14 claim for the same injury.

(4) An award of the costs and disbursements of this action, including class notice costs and interest;

(5) An award of attorneys' fees pursuant to Wis. Stat. § 133.18(1)(a), or as otherwise may be permitted by Wisconsin law, for the services herein rendered by class counsel;

(6) Pre-judgment and post-judgment interest in the full amount as may be permitted by law; and

(7) Any and all other relief to which plaintiffs and class members are entitled, in equity or at law, under the laws of the State of Wisconsin.

DEMAND FOR JURY TRIAL

Plaintiffs request trial by jury of all issues so triable.

Dated this 25th day of March, 2009.

By: */s/ W. Terrence Kilroy*
W. Terrence Kilroy
(MO Bar No. 28228)
R. Lawrence Ward
R. Daniel Boulware
Jennifer Gille Bacon
Gregory M. Bentz
POLSINELLI SHUGHART, P.C.
120 West 12th Street
Kansas City, Missouri 64105
Telephone: 816-421-3355
Facsimile: 816-374-0509

Robert L. Gegios
Alexander T. Pendleton
William E. Fischer
KOHNER, MANN & KAILAS, S.C.
Barnabas Business Center
4650 N. Port Washington Road
Milwaukee, WI 53212-1059
Telephone: (414) 962-5110
Facsimile: (414) 962-8725

Donald D. Barry
BARRY LAW OFFICES, L.L.C.
5340 S.W. 17th Street
Topeka, Kansas 66604
Telephone: 785-273-3153
Facsimile: 785-273-3159

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL No. 1566

CV-S-03-1431-PMP (PAL)
BASE FILE

IN RE WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

LEARJET, INC., ET AL.
v.

ONEOK INC., ET AL.

(Civil Action No. 05-cv-1500)

DECLARATION OF MICHAEL HARRIS, Ph.D. in Support of Class Plaintiffs' Motion For Class Certification

October 17, 2008

Harris Economics Group

31st Floor
350 S. Grand Avenue, Suite 3160
Los Angeles, California 90071
(213) 621-7636

I. Introduction

A. Background and Qualifications

1. I am President of Harris Economics Group (HEG) in Los Angeles. HEG is an economic consulting firm. I have been a consulting economist for leading management and economic consulting firms for the last twenty years. I have provided economic research and consulting across a diverse set of industries and an equally diverse set of issues including market power, anti-competitive conduct, pricing, asset valuation, trade secrets, competitive bidding, class certification, compensatory and punitive damages, and regulation including deregulation.

2. I hold a Ph.D. in economics from the University of Washington with specializations in industrial organization and applied microeconomics. I have been retained as an economic expert in approximately fifty cases on a range of topics before state and federal Courts, the Federal Energy Regulatory Commission (FERC), numerous State Regulatory Commissions, the Ontario Energy Board, and the Alberta Energy and Utilities Board. In these engagements, I have been specifically retained to address issues related to class certification and the quantification of class-wide damages resulting from anticompetitive conduct, including commodity price manipulation.

3. In general, with respect to the natural gas industry, I have provided consulting and expert testimony on virtually every segment of the industry/market. With respect to the issue of gas

price manipulation, I have provided a significant amount of consulting and testimony on the issues of false reporting, wash trading, and churning. More specifically, during the California Energy crisis that emerged in 2000, I provided testimony before the Federal Energy Regulatory Commission on a number of issues. On behalf of the California Parties, which consisted of the California Attorney General's Office, Pacific Gas & Electric Company, Southern California Edison Company, the California Public Utilities Commission, and the California Department of Water Resources, I initially proffered testimony on the appropriate natural gas price input in the calculation of the Mitigated Market Clearing Price (MMCP), The latter was the FERC's estimate of the electricity price that would have prevailed absent the widespread and rampant manipulation of electricity markets by various entities including many of the Defendants in this case. Many market participants had manipulated not only electricity prices but also natural gas prices. Thus, the focus of my testimony turned to the ways in which the gas marketers had manipulated gas prices through the false reporting of prices and volumes to the trade publications, rapid fire buying and selling (i.e., churning) and wash trading. My testimony on these issues and others (as well as the testimony of other testifying experts) assisted the FERC to formulate the refund methodology used to establish refunds for consumers in California,

4. In addition to my FERC testimony, I have also been retained on numerous cases to provided expert testimony on the very issues that are the subject of the Plaintiffs' Complaint in this matter. More

specifically, I have provided testimony on the wash trading activities of two major gas and electricity marketers.[1] I was retained in a case titled, "Natural Gas Commodities" litigation which encompassed the same allegations of misconduct in this matter, i.e., false reporting, wash trading, and churning that manipulated the price of natural gas. during the 2000-2002 period.[2] In that matter, I testified on issues related to class certification and class-wide damages. The latter, of course, was predicated on a thorough understanding of how the anti-competitive conduct of the energy marketers impacted natural gas prices and thus harmed the plaintiffs. The court in that case ultimately certified the class. I was also retained by counsel for Plaintiffs in a California state case to investigate allegations of false reporting, wash trading, and churning in that natural gas market.[3] My curriculum vitae is attached as Exhibit 1.

5. HEG is being compensated for the time I spend on this matter at my normal and customary rate of $375 per hour, HEG is also being

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[1] United States District Court Eastern District of Michigan, In Re CMS Energy Securities Litigation, Cis. No 02 CV 72004 (GCS).

[2] United States District Court For The Southern District Of New York, In Re: Natural Gas Commodities Litigation, 03-CV6186 (VM)

[3] Superior Court of the State of California, County of San Diego, Natural Gas Anti-Trust Cases I, II, III, and IV, J.C.C. Proceedings Nos. 5221, 4224, 4226, and 4228.

compensated for time spent by research staff on this project at their normal and customary hourly rates.

B. Assignment

6. It is my understanding that plaintiffs are moving to certify the following proposed class:

> All industrial and commercial direct purchasers of natural gas for their own use or consumption during the Relevant Time Period, and which gas was used or consumed by them in Kansas. Excluded from the Class are (a) entities that purchased gas for resale (to the extent of such purchase for resale); (b) entities that purchased natural gas for generation of electricity for the purpose of sale (to the extent of such purchase for generation); (c) defendants and their predecessors, affiliates and subsidiaries; and (d) the federal government and its agencies.[4]

7. Counsel for the Plaintiffs asked me to identify and assess the economic evidence that would be used to determine whether the conduct of the Defendants impacted class members and whether this evidence involves the use of facts and methods that are common to class members.

8. I have also been asked to provide an opinion on the information, data, and the methodological framework needed to determine whether, and to what extent, the Defendants' activities artificially

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[4] Letter dated September 5, 2008 from Ms. Jennifer Gille Bacon to counsel for the Defendants.

impacted prices of natural gas nationwide and in Kansas and thus harmed class members over the Class period and whether common facts and analysis would predominate in such a damage analysis. With respect to the methodology needed to determine impact and thus damage, I am also working with Dr. Mark Dwyer of HEG who has been asked to provide an opinion regarding the empirical evidence related to the degree of market integration characterizing natural gas trading locations across North America.

9. The case addressed in this declaration is part of a broader consolidated case, which includes cases involving similar allegations, issues, and facts for commercial and industrial users of natural gas in the states of California, Colorado, Missouri, and Wisconsin. I have also been retained by counsel representing the Plaintiffs in those cases and have been asked to submit a declaration in support of their respective Motions For Class Certification. Accordingly, I am concurrently filing four additional declarations in support of class certification for those cases. Given the similarities in allegations and the factual underpinnings of the industries and markets, there is a significant amount of overlap between this declaration and those filed for the other cases.

10. In the course of my work as a testifying expert on issues related to natural gas I have reviewed numerous documents including testimony, reports, studies, books, articles, etc., including importantly those focused on the manipulation of natural gas prices. My work effort in this assignment was based on my overall knowledge of the natural gas markets and a review of reports issued by the FERC related

to market manipulation, various administrative orders issued by the Commodities Futures Trading Commission (CFTC) related to false reporting, and indictments issued by the Department of Justice (00J) against numerous energy traders. A significant amount of the analysis described in this declaration is based on data from the various trade publications and data from the Defendants themselves. Accordingly, as discovery is underway and ongoing, I will be conducting the quantitative analysis described in this declaration and will thus supplement the opinions and conclusions set forth below. A list of material relied on is provided in Exhibit 2.

C. Summary of Conclusions

11. It is my opinion that the impact on the price of natural gas in the broader US market and Kansas caused by Defendants' manipulation of prices would be common across class members given the fungibility of natural gas and the way natural gas is priced in the US and Kansas. Further, the data and analysis necessary to determine the impact of Defendants' conduct is common to class members.

12. Based on economic theory and analysis it is also my opinion that there exist commonly accepted and straightforward methods for determining and measuring the amount of artificiality in prices and thus the damages incurred by class members. The economic evidence and analysis used to estimate damages is also common to class members. In this opinion, I rely, in part, on the expertise of Dr. Mark Dwyer.

D. Overview

13. I have reviewed the plaintiffs' complaint and am very familiar with the substantial body of information on gas price manipulation. I have studied, consulted on, and testified about natural gas issues for the last twenty years. I am thus quite familiar with the North American natural gas market generally and the Kansas natural gas market specifically.

14. This case is not about some obscure amorphous anti-competitive conduct that had some questionable consequences. Rather, this case is about real anti-competitive conduct with real consequences that has been catalogued, studied, and investigated extensively by the FERC, the CFTC, the DOJ, and a slew of additional agencies. The reality and scope of just one form of the conduct is found in the following passage taken from a FERC report:

> Traders had the ability and incentive to manipulate the published indices and they did so....Staff began the investigation looking for evidence of energy price manipulation in the West. Staff found evidence of manipulation (direct and indirect) of the published natural gas price indices at significant trading points all over the United States.[5]

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[5] Final Report on Price Manipulation in Western Markets: Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2.000, March 2003, III-54 (emphasis added).

15. As the passage above indicates the manipulation was widespread and real, thus impacting the entire North American natural gas market. As will be discussed below, given the integration of the market, it can reasonably be concluded every area of the country was impacted by the manipulation.

16. I have prepared Exhibit 3, which is a graph that depicts prices before and during the class period. As can be seen there was a significant increase in the prices of natural gas beginning in 2000. The price spikes were clearly a significant departure from historical price levels.

17. The conspiratorial conduct at issue here has been, and is being, litigated across the country and has resulted in millions of dollars in penalties, administrative actions, indictments, guilty verdicts, and jail sentences. The Defendants themselves have entered into numerous settlements with governmental agencies and private plaintiffs for hundreds of millions of dollars.

18. The conspiratorial conduct at issue here, false reporting, wash trading, and churning, was designed specifically to prevent full and free competition with the ultimate objective of creating artificiality, manipulating, and controlling the price of natural gas. The natural gas prices that were the subject of this anti-competitive conduct were in no way isolated, rarely observed, or inconsequential market prices. Rather, it can be said that the prices that were the subject of the manipulation are the prices of natural gas in this country. These prices are widely used by private parties and government agencies

and are the reference points *and* thus basis for natural gas transactions throughout North America.

19. In this case, the path from conduct to harm is a simple one. The defendants sought and succeeded in manipulating a broad array of price indices—the same price indices used and/or referenced to calculate what the Plaintiffs paid for natural gas—thus causing direct impact. Plaintiffs are damaged in the amount of full consideration or sums paid. In the alternative, Plaintiffs are damaged in direct proportion to the magnitude, and extent, of price manipulation on prices and the volume of gas purchased.[6]

II. Overview of the North American and Kansas Natural Gas Markets

A. The North American Natural Gas Market

20. The Kansas natural gas market within which the commercial and industrial customers that are the plaintiffs in this action purchased natural gas is part of the broader North American natural gas market—a market which is a vast interconnected network linking production areas with market areas. The natural gas industry can be broadly segmented into: production; gathering; processing; transportation; storage; and distribution. Natural gas is produced from onshore and offshore fields across the United States, Mexico, and Canada. Natural gas produced at the various fields is

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[6] It is my understanding that Plaintiffs seek recovery based on a "full consideration" statute or, in the alternative, trebled antitrust damages.

gathered, processed and moved further downstream to a pipeline network that includes intra- and inter-state pipelines. Natural gas is also stored in production and market areas where it is withdrawn and delivered either to the pipeline network for further transport or to the distribution network of a natural gas utility that transports the gas to the burner-tips of natural gas consumers. Prices for natural gas are reported for a large number of locations across the North American market including production areas, pipeline interconnections, centralized hubs, and utility "citygates" and market areas.

21. Natural gas is bought and sold in numerous segments of the supply chain from the wellhead to the burner-tip of the consumer. A commercial or industrial consumer can purchase natural gas from a producer and arrange for transportation from the wellhead to his location. Although feasible, this is generally only undertaken by large gas users who have the capability to manage the contracts/assets (i.e., transportation, storage, etc.) needed to move the gas from the wellhead to the point of consumption. The more common method of purchasing natural gas for commercial and industrial customers is to enter into a transaction closer to the point of consumption. In addition, it is not uncommon for gas purchasers to utilize the services of agents or managers who essentially assist in the acquisition of the commodity and coordinate the services needed to move the gas from the seller to the buyer's points of consumption.

22. Aside from those commercial and industrial consumers who purchase directly from a producer

(which is not that common), the majority of natural gas is purchased from natural gas marketers such as the Defendants.[7] Traditionally, gas marketers provided a number of services including, but not limited to, gas acquisition, portfolio optimization, contract administration, and asset management. Predominantly, and particularly during the class period, gas marketers were major providers of natural gas. Gas marketers bought, sold, and traded gas across all of the major trading locations and "hubs" throughout the country.

23. Natural gas has always been the fuel of choice and this was certainly the case during the class period. At the end of 2002, the U.S. Energy Information Administration reported that over 66 million customers in the U.S. consumed approximately 21,227,015 million cubic feet of natural gas.[8] In 2002, natural gas was the second largest energy source produced in the U.S. and represented almost 28 percent of all energy produced.

24. Gas is purchased in a physical and a financial market. A financial market such as the New York Mercantile Exchange's natural gas futures market is where gas can be bought or sold for future delivery. Futures contracts are standardized and represent the obligation of a buyer or seller to take delivery or

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[7] In some cases Plaintiffs might enlist the assistance of a third party to acquire natural gas and natural gas services.

[8] http://tonto.eia.doe.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm.

make delivery at some future month at a specified price. For example, a purchaser in August can purchase a futures contract for $6.00 per MMBtu for delivery in October. While a buyer or seller can take or make delivery at the maturity of the futures contract, in reality the vast majority of futures contracts are settled financially with no physical delivery.

25. The physical market is a market for gas that is bought and sold and delivered to a particular location on a particular date. In the physical market gas is purchased predominantly either in the daily or bidweek market. The daily market is just that and represents gas purchased for next day delivery. The bidweek market is a monthly market and is utilized to acquire gas over the course of the month. A purchaser acquires gas for delivery at a set amount each day over the course of the upcoming month.

26. Gas is purchased using, for the most part, standard contracts. Indeed, the North American Energy Standards Board[9] years ago developed the Base Contract For the Sale and Purchase of Natural Gas which is used broadly throughout the industry. Natural gas purchase contracts are indeed standard, by industry design, and include numerous legal provisions but importantly specify the type of service, quantity, delivery point, price, etc.

27. Natural gas prices at any particular location are not determined in isolation. That is, prices are

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[9] It was previously known as the Gas Industry Standards Board.

not determined solely by the interactions of buyers and sellers at one location and the supply and demand factors relevant only to that location. Rather, natural gas prices at any particular location are determined by the interaction of buyers and sellers and supply and demand factors across the entire North America natural gas grid. Indeed, price shocks (such as those that occurred in California during the energy crisis when daily prices for natural gas rose to an unprecedented $60 per MMBtu!) at any one location reverberate and are transmitted across the entire North American gas grid. As discussed in Dr. Dwyer's declaration, there is overwhelming empirical evidence supporting the proposition that prices across the entire North American natural gas grid move together. Simply put, the data reveal long-run common movements in natural gas price indices across the country. Any divergences observed between prices at different locations do not persist. In his declaration, Dr. Dwyer provides the formal econometric evidence of market integration.

28. The prices observed at the various locations across the natural gas grid are, predominantly, the price indices reported by natural gas trade publications.[10] A price index is meant to capture and reflect the average price of transactions at a particular location. For example, assume three pairs of buyers and sellers agree to the following prices for

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[10] In addition to trade publications, natural gas prices are reported on online trading platforms. One such platform during the class period was Enron Online.

natural gas to be delivered on Wednesday in Chicago: pair #1-100 MMBtu at $4.00 per MMBtu; pair #2-200 MMBtu at $4.10 per MMBtu; and pair #3-1000 MMBtu at $4.20 per MMBtu. A price index could represent the weighted average of these transactions—$4.17. Thus, the trade publication would report a price index for Wednesday at Chicago of $4.17.[11]

29. Price indices, as established market prices for natural gas, have always been pervasive in the industry, particularly over the class period. One reason for this was the evolution of the industry. Prior to the deregulation of natural gas prices and the "unbundling" of the industry,[12] a great deal of natural gas was purchased under very long-term fixed price contracts. As the market became deregulated and unbundled, vibrant spot markets came into existence. What was lacking, though, was a mechanism for transparent pricing. Trade publications began regularly (daily and monthly) conducting surveys of buyers and sellers at particular locations and reporting those transactions in some form of a price index. The price indices became the focal point for valuing natural gas and

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[11] Calculated as: [(4.00*100)+(4.10*200)+(4.20*1000)]/(1300).

[12] Unbundling refers to the unbundling of transportation and storage service from the provision of the commodity. Historically, interstate pipelines acted as merchants providing a bundled product to the LDCs on their system. Through deregulation, unbundling, and open access directives, today pipelines act as common carriers and simply transport natural gas. The natural gas commodity is purchased by consumers directly from sellers (i.e., producers, marketers, etc.).

became common fixtures in supply and purchase contracts.

30. Trade publications have historically reported these prices and have done so by collecting and compiling individual reports from market participants on their trades, including information on the volume traded and the transaction price. Such information is used by the trade publications to calculate price indices, which serve as the reported price. These indices are reported for many locations and represent the price at which natural gas is bought and sold at that location. The indices reflect, for example, prices for natural gas bought and sold in a daily market as well as gas bought and sold for consumption in the coming month—sometimes referred to as "first-of-the-month" or "bid-week" transactions. The latter is essentially baseload gas to be taken in the coming month. The term spot price is a reference to the prices reported by the trade publications. The trade publications publish the methods used to calculate price indices.[13]

B. The Kansas Natural Gas Market

31. As mentioned, the Kansas natural gas market is part of the broader North American gas market.

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[13] Platts, a McGraw Hill company, is a major natural gas trade publication that provides price indices throughout North America. In addition to its publications, Platts, on its website, provides the Methodology and Specifications Guide for North America, which details the survey process and mathematical approach used to calculate price indices. See: http://www.platts.com/Natural%20Gas/Resources/Methodology%20&%20Specifications/na_gas_methodolgy.pdf?S=n.

In 2000 (the first year of the class period), Kansas consumed approximately 253,037 MMcf of natural gas or 1.17 percent of the national total of 21,539,964 MMcf. In that same year, Kansas received (interstate receipts) approximately 1,130,728 MMcf of natural gas and delivered (interstate deliveries) approximately 1,344,919 MMcf of natural gas. Kansas also has gas production and had "dry" production of 481,529 MMcf of natural gas. In 2000, the number of commercial and industrial customers was approximately, 87,007, and 8,833, respectively. In addition, there were approximately 7,028 and 4,755 commercial and industrial "transport" customers, respectively.[14] Transport customers are those who acquire and manage their own transportation assets and purchase on their own behalf. Natural gas is delivered to and within Kansas by a number of interstate and intrastate pipelines including for example: ANR Pipeline Co., Cheyenne Plains Pipeline Co., Enbridge KPC, CenterPoint Energy Pipeline Co., KM Interstate Gas Transmission Co., Natural Gas PL Co. of America, Northern Natural Gas Co., Panhandle Eastern PL Co., and Southern Star Central Pipeline Co.[15] In

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[14] The data in this paragraph related to consumption, receipts/deliveries, production, storage, and numbers of customers was taken from data published by the Energy Information Administration and can be found at: http://www.eia.doe.gov/oil_gas/natural_gas/info_glance/natural_gas.html

[15] The data in this paragraph related to interstate and intrastate pipeline companies was taken from data published by the Energy Information Administration and can be found at

addition, to pipeline transportation, Kansas has 300,401 MMcf of underground natural gas storage capacity. Customers in Kansas are either served directly off one of the intrastate or interstate pipelines or via one of the local distribution utilities. These include, for example, American Energies Gas Service, Aquila Networks, Atmos Energy, Armillo Natural Gas, Inc., Kansas Gas Service, etc.[16]

32. Kansas consumers receive gas from a number of producing areas including those in the Western United States (e.g., Rocky Mountains, Permian, San Juan). The bulk of natural gas received by Kansas comes from Oklahoma while majority of the gas delivered from the state goes to Missouri and Nebraska.[17] There are a number of major pipeline Interconnects and hubs that serve as pricing points. During the class period, Platts and Natural Gas Intelligence, two major trade publications, reported price indices at five locations. These include: Panhandle Eastern (Haven, Kansas), Northern Natural Demarc, ANR SW, Southern Star Central (Ottawa, Kansas), and Northern Natural Mid 10-13.

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http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/index.html

[16] The data in this paragraph related to natural gas distribution utilities was taken from data published by the Kansas Corporation Commission and can be found at http://www.kcc.state.ks.us/maps/ks_gas_certified_areas.pdf

[17] The data in this paragraph related to interstate movements of natural gas was taken from data published by the Energy Information Administration and can be found at: http://www.eia.doe.gov/oil_gas/natural_gas/info_glance/naturalgas.html

Natural gas purchased and delivered to the Plaintiffs in this case can be referenced to these pricing locations and more.

33. The class members in Kansas include persons and entities who purchased directly for their own consumption. The named Plaintiffs include: Learjet Inc. and Topeka Unified School District. All the named Plaintiffs purchased for their respective facilities in Kansas.

III. The Manipulation of the North American Natural Gas Market

34. Much has been written about energy market manipulation. While events in California originally took center stage, it became clear that the scope of the problem was truly national. With respect to California, the FERC reported on widespread market dysfunctions and market abuse in its findings of price manipulation of Western Markets. The FERC highlighted the link between natural gas and electricity markets and the fact that dysfunctions one market fed off the dysfunctions in the other. The manipulation of electricity markets took the form of economic and physical withholding of supply, inflated bidding, and gaming—particularly by Enron. As electricity prices spiked so did natural gas prices. Aside from any indirect manipulation of natural gas prices, the FERC found that rapid fire trading moved natural gas prices higher. This type of behavior when combined with wash trading and false reporting drove natural gas prices to unprecedented levels. Moreover the conduct studied by the FERC was not isolated to one or two

companies but involved the vast majority of electricity and natural gas marketers.

35. The Complaint in this case alleges various types of conduct including: false reporting to the trade publications, wash trading, and churning. False reporting included reporting either a fictitious price and/or volume to the trade publication in the hopes of moving the index in a way that benefited the Defendants' position.

36. Wash trading occurred when two parties agreed to buy and then simultaneously (or nearly simultaneously) sell a certain amount of gas at a pre-specified price. Given that one transaction merely offset the other (i.e., a "wash"), no gas moved physically between the parties. Thus, the parties incurred no financial risk and the transactions had no economic purpose. The Defendants engaged in wash trading for a number of reasons. One reason was to give the appearance that a company had a large gas marketing business. During the class period, a number of publications would rank gas marketers by the size or volume of the trading activity. Wash trading helped these companies propel themselves higher in the rankings. Another reason underlying wash trading was to hide their false reporting activity, The trade publications could, if they so desired, ascertain the validity of a reported transaction by contacting the counterparty of a reported transaction. By engaging in a wash trade a company could in effect "validate" its false report.

37. Churning typically refers to activity conducted on an online trading platform. During the class period, the most important of such platforms was

Enron Online (EOL). EOL was a "one-to-many" platform, meaning that Enron was in essence the counterparty to every trade. All buyers and sellers would submit bids and Enron would clear the bids. Churning occurred when a party would rapidly enter into, say, a multitude of purchase transactions over a short period of time only to "unwind" those transactions by entering an offsetting number of sell transactions over an equally short period of time. Churning has the effect of moving prices rapidly in one direction or the other in very short periods of time. Moreover, the pivotal role played by EOL and its effect on price indices cannot be understated. The FERC in various reports is clear that traders used EOL for price discovery so the price of non-EOL trades was influenced by activity on EOL. For example, the FERC found a very close relationship between prices on EOL and daily indices for the California border.[18]

38. It is also important to understand that the manipulation, while directly creating artificial prices, also induced volatility and a false sense of liquidity in the market. FERC found that churning served to directly impact prices but also served to inflate volumes reported to trade publications and EOL. As noted by FERC, "Thus, the volume reported and the observed activity on EQL give the illusion of a much more liquid market than was actually present."[19] Although the prices observed by purchasers in the market are dearly important so too

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[18] FERC Final Report III-35.

[19] Ibid.

are the volumes supposedly being transacted. Volumes are important because to the extent they are indicating an increase in volatility this is a sign to purchasers that the market and prices are becoming more uncertain (i.e., riskier). Further, aside from any message about risk, increasing volumetric activity sends the signal that demand is increasing, which in itself will impact how purchasers view the market today and in the future.

39. The conduct at issue here has been well documented in numerous settlements between the Defendants and governmental agencies and actions against individual energy traders. Exhibit 4 lists the various settlements and actions. As shown on Exhibit 4 there have been 18 settlements with the CFTC. There have been at least two settlements with the FERC. Finally, there have been 23 U.S. Department of Justice indictments, convictions, plea agreements, and penalties imposed.

40. Given the sheer number of settlements, indictments, plea agreements, etc. any detailed assessment of that material is beyond the scope of this report. However, a review of a sample of the agreements and settlements highlights the severity of the manipulation and its scope.

41. A common theme in the numerous settlements with the CFTC is the finding that the conduct at issue here was in no way simply a lapse in judgment or a gray area. For example, variations of the following language of the CFTC settlement with Williams Energy Marketing and Trading (WEMT) can be found in the vast majority, if not all, the CFTC settlements:

> From at least January 2000 through at least June 2002, WEMT delivered false reports to the reporting firms. These reports, submitted telephonically, by facsimile and through electronic mail, contained nonexistent trades, as well as certain actual trades in which the price and/or volume was altered. WEMT also failed to include other actual trades in these reports. WEMT employees knowingly delivered false trade information to reporting firms in an effort to benefit WEMT's trading position.[20]

42. A cursory review and sampling of the other legal documents finds the same:

> El Paso Merchant Energy: Mr. Dallas Dean
>
> Defendant knew the list [of purported fixed priced trades] was inaccurate because Defendant knew the trades appearing on the list were not fixed-priced natural gas trades. The inaccurate information was market information that tended to affect Inside FERC's index prices and, as a result, tended to affect the price of a commodity that traveled in interstate commerce, namely, natural gas.[21]

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[20] Commodity Futures Trading Commission, In The Matter of: Williams Energy Marketing and Trading, CFTC Docket No. 03-21, July 29, 2003.

[21] United States District Court For The Southern District Texas Houston Division, United States v. Dallas Dean, Criminal No. H-04-450, p.9. (emphasis added)

CMS: Jeffery A. Bradley and Robert L. Martin

During the relevant period, on at least one occasion, Martin **conspired** and coordinated with Bradley, **and caused** reports to be submitted to natural gas reporting firms, including Gas Daily, Btu Daily, NGI, and Natural Gas Week.[22]

Duke Energy Trading and Marketing: Michael Whitney

On a regular basis during the relevant period, Defendant **knowingly submitted**, or knowingly caused to be submitted, reports concerning trades executed on behalf of DETM to at least two reporting firms, Gas Daily and Enerdata. Defendant's reported trades included false or misleading or knowingly inaccurate price and/or volumes for certain trades.[23]

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[22] United States District Court For The Northern District of Oklahoma, U.S. Commodity Futures Trading Commission v. Jeffrey A. Bradley and Robert L. Martin, ¶ 23. (emphasis added)

[23] United States District Court For The Southern District of Texas Houston Division, United States Commodity Futures Trading Commission, v. Michael Whitney, ¶ 34. (emphasis added)

Coral Energy Resources: Johnson, Moore, Tracy, Harp, Dizona, and Dyer

> Specifically, on a monthly basis from as early as October 2001 and continuing to at least June 2002, Trader Defendants knowingly delivered reports containing knowingly inaccurate fixed-price, physical, baseload trade information for at least (9) locations including El Paso Permian Basin, San Juan Basis, Southern California, PG&E Citygate, PG&E Topock, Malin Rockies, Northwest Pipeline. For example, on June 28, 2002, Trader Defendants reported as "Coral Energy Resources July 2002 Deals" trade information for 158 separate fixed-price baseload, physical, baseload trades at these locations. However, during the pertinent bidweek of June 2002, all traders on the West Desk actually executed a total of 13 fixed-price, physical, baseload trades at those locations.[24]

43. Similar language to that in the above excerpts can be found in the dozens of other legal documents. It is clear that the traders knew what they were doing when they engaged in false reporting. It is also clear that the practice was widespread and impacted prices throughout the country.

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[24] United States District Court For The Southern District Of Texas, U.S. Commodity Futures Trading Commission v. Denette Johnson et al, ¶ 26. (emphasis added)

IV. Common Impact

44. All of the conduct described in this Complaint is alleged to have artificially impacted prices for natural gas purchased by commercial and industrial customers in the state. Assuming, as is typically the posture in the class certification phase of litigation, that the allegations are true, economic analysis can be used to determine whether the conduct was effective at manipulating prices and whether class members were affected by it.

45. At issue are several types of conduct including: falsely reporting price and volume information to the trade publications; wash trading; and churning. The evidence needed to determine whether indeed the indices were manipulated includes an analysis, for example, of the trading data of the Defendants used to construct the various indices and the degree to which such data is false. Such analysis and evidence is common to class members. Similarly, the analysis and evidence used to determining the degree to which wash trading and churning occurred and its effect on market prices will include an evaluation of the Defendants' data, market data, and analyses that employ commonly used mathematical and statistical techniques that are common to class members. Further, the work being conducted by Dr. Dwyer related to market integration involves data on market prices and econometric methods that: are: common to class members. In short, the economic evidence relied on to determine whether the alleged conduct had an impact on natural gas prices is not specific to any

class member or groups of class members but rather common to class members.

46. An additional issue that must be addressed is whether there is commonality of impact. That is whether class members suffered harm from the alleged conduct. Assessing whether there was commonality of impact requires an analysis of whether class members are similarly situated and thus exposed, in a universal sense, to the impact arising from the Defendants' conduct,

47. Class members are similarly situated to the extent they transact in markets driven by similar fundamental factors and transact for the commodity in similar ways. More specifically, class members are similarly situated to the extent they transact in a market driven by same or similar economic, market, industry, and institutional fundamentals rather than a market that is highly fragmented with sub-markets each having highly unique features, They are also similarly situated to the extent the terms and nature of exchange between suppliers of the commodity are generally common across class members rather than highly idiosyncratic and dependent on the type of transactions and the identity of the parties involved. Finally, they are similarly situated to the extent the Defendants were incapable of pursuing a strategy that only impacted certain class members and not others.

48. One of the first issues that must be addressed is the nature of the commodity In question. This is so, simply because the nature of the commodity has a direct bearing on the answers to the questions posed in the previous paragraph. Natural gas is a fungible

commodity. Fungible simply means that one molecule of gas is perfectly substitutable for another molecule of gas. There are differences in the quality of natural gas but these are found primarily as the gas is extracted from the wellhead. When produced, natural gas contains a number of impurities (e.g., water, sulfur, etc.) and also contains a number of other liquid products (e.g., ethane, butane, propane, etc.). Before the gas can be transported on an interstate or intrastate pipeline it has to meet certain quality standards. Natural gas producers meet these quality standards by processing the natural gas prior to its delivery to the nation's transportation network. As such, by the time the natural gas is delivered to Kansas one seller's gas is indistinguishable from any other seller's gas. Indeed, when a buyer purchases gas from a seller, it is not as if the seller's molecule of gas is somehow "tagged" and delivered to the buyer's delivery point. Rather, the seller simply nominates his gas onto the relevant pipeline that serves the buyer and the seller's gas thus becomes part of a common pool of gas that is delivered to all purchasers. This is an example of perfect substitution in economics.

49. Because natural gas is fungible, the terms of trade include standardized pricing for all consumers. Gas is priced at a set dollar amount per MMBtu[25]—with one MMBtu being equivalent to any other. As previously discussed, natural gas is bought and sold at numerous locations within Kansas. The price of

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[25] MMBtu is short hand for one million British thermal units, which is a heat content measure of gas.

gas at these locations is reported as a price index and published in various publications and is bought and sold in specified quantities (e.g., MMBtu, or mcf[26]). Because pricing is standardized (due to the underlying fungible nature of the commodity), natural gas purchased from any one seller is perfectly substitutable with that from another seller. Importantly, if the price of natural gas at one location increases/decreases, it does so for everyone purchasing at that location and is not affected by the identity of any particular buyer or seller. Importantly, there is nothing specific about the negotiation or resulting transaction between a seller and a buyer that would render a transaction immune to the consequences of the conduct alleged in these cases. More specifically, if a Defendant has manipulated price indices, everyone who purchases natural gas based on that price index will be harmed, While a seller can tailor an agreement to provide additional services beyond just the commodity, if the underlying natural gas is priced at, or determined with reference to, a price index, the buyer of that natural gas will be harmed in the event the index reflects an artificial price. Indeed, all purchasers who bought at that price index will be harmed because they have purchased at a price that does not reflect the competitive dynamics of the market. Rather, they pay a price that reflects the actions of entities whose goal is to prevent full and free competition and who seek to control the prices paid for natural gas.

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[26] Mcf is short hand for one thousand cubic feet, which is a volumetric measure of gas.

50. As previously mentioned, gas purchase agreements are typically standardized and specify the price at which the seller will sell natural gas to the buyer. Price will reflect a dollar amount per a volumetric or heat content quantity. As discussed, this prevails simply because of the fungible nature of natural gas. Importantly, there is nothing unique or idiosyncratic in the terms of exchange or purchase agreements between a particular marketer and class members that would bear directly on the pricing of the underlying commodity. The commodity exchanged between one buyer and one seller is identical to that of another buyer and seller and indeed the entire class.

51. The market in which class members purchase natural gas is also driven by the same or similar market fundamentals. That is, there is no subset of class member who purchase in a market that is driven by different supply and demand factors or subject to unique regulation or institutional factors. The prices paid by the Plaintiffs represent the market conditions and these market conditions are reflected in the prices observed in the market. A simple correlation of prices observed and reported by trade publications, online platforms, the futures market, and the U.S. government confirms that Plaintiffs purchase gas in a very cohesive and integrated market. Exhibit 5 provides a matrix showing such correlations.

52. As can be seen from the correlations in Exhibit 5, the prices observed and reported from the various sources are highly correlated. The prices examined in Exhibit 5 are prices observed in the

market and are either referenced or used by the class members. It is simply infeasible and indeed irrational for a consumer not to reference, if not use outright, the prices shown in the exhibit.

53. The correlation analysis indicates a high degree of homogeneity within the state itself with regard to prices. The seamless nature of the market extends beyond Kansas. There is nothing unique about the Kansas gas market vis-6-vis the country. Kansas has the same sorts of natural gas assets (e.g., pipelines, storage facilities, etc.) that are used to serve gas consumers as does any state. While there can be localized supply and demand conditions, Kansas (like all states) is subject to the underlying supply and demand fundamentals of the nation. As discussed previously, all of the regional gas markets in the U.S. are integrated. As described more fully by Dr. Dwyer, price movements or shocks at any one particular location will propagate across the entire grid. What this means in essence is that manipulation of say the price index for natural gas purchased at the California border or Permian basin will impact not only those price indices but will also impact price indices at other locations. Further, while the :effect of the Defendants' conduct was to artificially alter the prices paid by class members, the actual prices subject to the manipulation are transparent market prices used by all in the market. To the extent the Defendants engaged in the conduct and to the extent that conduct was successful and created artificial prices, the prices being altered are not customer specific but rather market prices observed and relied upon by all.

54. With respect to common impact, it is clear that class members are similarly situated given: the fungible nature and thus standardized pricing of natural gas; the inability to develop unique terms of exchange for the provision of natural gas as a commodity; and the underlying reality that the market in which class members purchased the gas is not segmented by unique and different economic, market, industry, or institutional fundamentals. Rather, class members purchased in a market that is defined (perhaps uniformly) by the same fundamentals. Finally, given the type of conduct alleged and the prices subject to the manipulation, the Defendants' conduct would impact prices observed and relied upon by all. Thus, the Defendants conduct, if taken as true, would have had a common impact across class members.

V. Estimating and Quantifying Impact of Alleged Misconduct on Natural Gas Prices

55. The discussion above showed that Defendants' manipulative conduct and the fact that, such conduct impacted natural gas purchasers can be estimated by common proof. The same is true as far as establishing the extent of that impact. With respect to the full consideration remedy, it is my understanding, that once it is established that Defendants' conduct altered prices, all that remains to be done is to ascertain the amounts class members paid for natural gas. This latter task is straightforward and does not implicate economic theory or methods.

56. In order to form an opinion regarding whether and the extent to which natural gas prices in Kansas

were manipulated, an investigation would be undertaken to compare the prices that actually prevailed during the class period to those which would have prevailed during the class period absent the conduct of Defendants (the "but-for" prices). The Defendants engaged in a variety of conduct designed to manipulate natural prices including wash trades, reporting false trading information, and churning. There exist empirical methodologies that may be employed to quantify the extent to which natural gas prices were manipulated by Defendants' conduct. These methodologies include benchmarking/ regression analysis, and reconstruction of the trade publication indices, all of which have been used successfully in related cases.

A. Benchmarking/Regression Analysis

57. The general concept underlying benchmarking is to compare some variable, say price, between two time periods, which are distinguished only by the presence of some factor, for example, conspiratorial conduct to fix prices. For example, the factor may have been present in the second, but not the first time period. If it is possible to attribute the change in price between the first and second periods to just the presence of the factor (in the second period), one can use prices observed in the first period as a means to "benchmark" what prices would have been in the second time period but for the presence of the factor.

58. In the present case, the goal of the benchmarking would be to choose a benchmark period in which natural gas prices were not manipulated as a basis for constructing prices that

would have existed but for the alleged misconduct during the non-benchmark period. Benchmarking is used frequently in litigation settings and is a straightforward method for determining impact of a defendant's conduct—particularly when such conduct is the sole underlying cause of a change in price. When there is an open question as to whether other factors may have impacted price, regression models are typically employed.

B. Reconstruction of The Trade Publication indices

59. In the alternative to the full consideration remedy, the reconstruction of the North American trade publication indices is essentially a task of "purging" the artificiality caused by the alleged misconduct of the Defendants. The discussion that follows is only related to quantifying impact related to false reporting. It does not address the effects of churning or wash trading. Dr. Dwyer's analysis will address these two types of conduct.

60. Of the methods described in this section, reconstruction of the indices is the most straightforward analytical approach and thus the preferred approach. As discussed previously, the trade publications collect reports from the various market participants on the volume of gas traded and the transaction price and use these reports to calculate price indices for the various locations. A simple calculation would entail, for example, taking all the reports and calculating a weighted average of all the transactions for a particular day/location. Of course, the index calculated would only provide an accurate reflection of the market price if all the

reports submitted and used in the calculation were legitimate. Given knowledge of the Defendants' transactions, reported prices to trade publications and the methods used to calculate the published indices it is possible to reconstruct the index to properly reflect market prices by simply recalculating the index using only legitimate reports. For example, assume the index at location A for Wednesday was calculated using the following three reports submitted by three participants: 100 MMBtu @ $10.00 per MMBtu; 100 MMBtu @ $10.00 per MMBtu; and 100 MMBtu @ $20.00 per MMBtu. Assume further that the last report of 100 MMBtu $20.00 per MMBtu was false. If all of these reports were used in the index calculation, the weighted average price index would be $13.33. Of course, this would not reflect a true market price. However, by simply removing the false report, one could recalculate the index to arrive at the but-for true price index of $10.00 per MMBtu. Thus, given information from the Defendants and the trade publications it is possible to reconstruct what the published price indices would have been in the absence of the Defendants' conduct. The more specific steps taken in such analysis is described below.

61. The broad steps undertaken to create but-for price indices include:

a) Identifying the Defendants' actual natural gas transactions from their databases;

b) Identifying the price index locations and months in which false reporting occurred, by

comparing the actual trades with reports of trades to the Publications;

c) Replicating the published price indices using the underlying data provided by McGraw Hill and Intelligence Press;

d) Creating a but-for natural gas price index by recreating the published index using the Defendants' actual natural gas transactions.

a. Identifying The Defendants' Actual Natural Gas Transactions

62. The Defendants maintain databases that include every physical and financial transaction ever entered into. Generally, each database will include information related to deal identifier, trade date, start and end date of gas flow, trade location, transaction price and volume, and counter-party. These databases are used for a variety of reasons by the Defendants including: scheduling, accounting, risk management, etc.

63. It is necessary to identify the various types of transactions in the database because this has a bearing on the type of index developed. For example, when developing first-of-the-month (or bidweek) price indices the trade publications survey buyers and sellers for just that type of transaction. Alternatively, the trade publications may seek data on just daily transactions. Simply put, when the survey is conducted, the trade publications seek very specific information. Indeed the trade publications have established the criteria that specify how the various transactions are to be categorized. For

example, bid-week transactions have criteria that are precisely established by McGraw Hill and Intelligence Press (trade publications). McGraw Hill describes bid-week transactions as fixed priced, baseload deals negotiated during bid-week, which, generally speaking, is defined as the last five business days of the month. Similarly, Intelligence Press describes bid-week deals as negotiated, fixed-price, non-affiliate natural gas transactions for monthly (bid-week) "baseload" delivery, during the last five business days of the month.[27]

64. Using the criteria established by the trade publications, it is possible to screen the Defendants databases and identify all bid-week transactions for all locations and for all months in the class period. Generally, the screen provides a preliminary dataset of all physical, fixed-priced, bid-week transactions. From the preliminary dataset, it is sometimes necessary to exclude some transactions (e.g., internal transactions—those between affiliates). The remaining dataset once constructed will represent all actual bid-week transactions for each of the Defendants.

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[27] See Platts Methodologies and Specifications at www.Platts.com and www.intelligencepress.com/methodology.html

b. Identifying the price index locations and months in which false reporting occurred, by comparing the actual trades with reports of trades to the Publications

65. The resulting bid-week dataset described in the previous paragraph can be used to identify which of the trade reports submitted by the Defendants were false and will also be used as the basis for calculating a but-for bid-week natural gas price index. As part of this step, it is first necessary to map the location descriptions in the databases for each Defendant with price index locations contained in the Trade Publications.

c. Replicating the Published Price Indices

66. The ultimate objective will be to reconstruct the reported price index, for a given location and month, by removing the false reports submitted by the Defendants and substituting their actual transactions and thus recalculating what the trade publications' reported indices would have been but-for the false reports of the Defendants. However, as a first step it is necessary to determine whether the actual published price index for every location/month can be recreated using the underlying data provided by the trade publications. In the event it is not possible to mathematically recreate the published index using the underlying data, a but-for natural gas price index may or may not be developed for that particular location/month. For example, one could hypothetically analyze the price reports provided by the trade publications for say, Malin, Oregon in

January 2001, and calculate a weighted average price based on those price, reports. If the recalculated price differed from that which was actually published by the trade publications, it would suggest that something other than the raw underlying price reports had been used to determine the ultimate published price index. As it would not possible to identify what the "something" was, the price index for Malin in January 2001 may not be recreated and alternatives to the construction of a but-for price index for that location/month would have to be considered.[28]

67. As part of the replication process, it will be necessary to determine the mathematical averaging technique employed by the trade publications to calculate the price index for a particular location and month. With respect to determining the averaging technique employed by the trade publications to calculate the published price indices, one can rely on the methodological guidelines of the trade publications themselves. With respect to Intelligence Press, a weighted average calculation is applied to the final set of trade reports used to calculate the price index after data meeting certain

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[28] This is only an example. Assuming the replicated index differs from the reported index it would still be possible to create a but-for price by substituting the actual transactions of the Defendants for their reported prices. However, in addition to the data substitution it would be necessary to adjust the but-for price by an amount equal to the difference between the replicated and reported price. In effect, the non-data influence embedded in the reported price would be transferred to the but-for price.

criteria are eliminated. McGraw Hill employs one of three techniques to arrive at the published price index including: median, weighted average, or a simple average of both.

d. Creating But-For Price Indices Using Defendants' Actual Natural Gas Transactions

68. Using the trade publication data, the but-for index will be developed by first substituting the trade reports submitted by the Defendants with their actual bid-week transactions. Second, using the substituted data, a but-for price index can be calculated using the same mathematical approach used to replicate the published price index described above. For example, with respect to Intelligence Press, a weighted average can be taken of the data. With respect to McGraw Hill, the but-for price index can be calculated using the same methodology as that used to replicate the price index. For example, if the price index was replicated by calculating the median of the data, then a median was taken of the new set of data containing the actual trades of the Defendants.

69. The but-for price index calculated described above is just the first step of a two step process. The second step involves inputting these location-specific but-for prices into the interregional model developed by Dr. Dwyer that accounts for interregional linkages and accounts for churning and wash trading to arrive at a full set of but-for price indices.

70. The methods just described are in no way speculative. The index reconstruction method is

precisely the method used to calculate but-for price indices in the Natural Gas Commodities litigation. The method is straightforward, tractable, and sound. In addition, Dr. Dwyer was my co-expert in that litigation. Thus, the analytical and econometric methods employed in this case are, and will be, quite indistinguishable from that used successfully in the Natural Gas Commodities litigation.

VI. Damages

71. As stated above, recovery under full consideration is straightforward and involves ascertaining what class members paid for natural gas. In the alternative, class-wide damages would be calculated using the set of but-for spot prices described above. Specifically, damages for the class would be calculated as the product of the differential between actual and but-for natural gas prices and the volumes affected.

VII. Information and Data Required For The Analysis

72. There are a number of potential sources of information required for this analysis. First, extensive use would be made of large, publicly available datasets concerning natural gas spot prices used for, say purpose of a benchmark analysis. To the extent necessary, information related to weather, storage activity and other factors relevant for the benchmark model could be obtained through publicly available sources, either industry or government.

73. Another data source consists of information obtained through discovery from Defendants. The

information/data collected would either be used directly or indirectly in the analysis. This material obtained from discovery would include information related to when, how, and where Defendants were attempting to create artificial natural gas prices. Such information would include, for example, data on the Defendant's wash trades and other information related to other activities designed to manipulate natural gas prices. This information would also include actual prices and quantities transacted by Defendants. I have received transactions data for some of the Defendants. While my analysis is not complete, my preliminary evaluation indicates that the data provided is similar to, if not identical to, that provided in the Natural Gas Commodities litigation, which has already been successfully analyzed and used to reconstruct price indices.

74. In addition to the Defendants' data and as highlighted previously, there are references in the legal documents that highlight where and when the Defendants were manipulating prices. More broadly, there is a wide array of information that can be used to inform Dr. Dwyer's and my analysis, including the CFTC settlements, DOJ indictments, and importantly the various reports issued by the FERC that represent that agency's findings regarding Defendant-specific manipulation.

75. Another source of data would be obtained through discovery from third parties and the trade publications that compiled, calculated, and reported pricing information over the class period. As

discussed above, this information would assist me in reconstructing the but-for price indices.

VIII. Conclusion

76. It is my opinion that the impact on the price of natural gas in the broader US markets and Kansas caused by Defendants' manipulation of prices would be common across class members given the fungibility of natural gas and the way natural gas is priced in the US and Kansas. Further, the data and analysis necessary to determine the impact of Defendants' conduct is common to class members. Based on economic theory and analysis it is also my opinion that there exist commonly accepted and straightforward methods for determining and measuring the amount of artificiality in prices and thus the damages incurred by class members. The methods and analysis used to estimate damages is also common to class members.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: October 17, 2008, Los Angeles, California

/s/ Michael J. Harris
Michael J. Harris

DECLARATION OF TODD MORTIMER

I, Todd Mortimer, declare:

1. I am the Director of Gas & Power Marketing at CMS Energy Resources Management Company (known during the relevant time period as CMS Marketing Services and Trading Company) ("ERM/MS&T"). I am personally familiar with the facts stated herein and, if called as a witness, could and would testify competently thereto.

2. I have been the Director of Gas & Power Marketing at ERM/MS&T since 2008. Prior to then I have held various positions of increasing responsibility since joining ERM/MS&T in 1994. During the period of 2000 through 2002, I held the positions as Commercial Account Manager (2000 — 2001) and as Director of Commercial Sales (2001 — 2002).

3. As the Director of Gas & Power Marketing, I am familiar with how natural: gas transaction information is recorded. For purposes of this declaration, I have reviewed the databases used by ERM/MS&T and CMS Field Services, Inc. ("Field Services") to record their natural gas transactions during the years 2000-2002.

4. During the years 2000-2002, ERM/MS&T and Field Services were affiliated with CMS Panhandle, which was a partial owner of the Panhandle Eastern Pipeline.

5. During the years 2000-2002, ERM/MS&T and Field Services were affiliated with Consumers

Energy Company, which is a Local Distribution Company located in Michigan.

CMS Oil and Gas

6. During the years 2000-2002, CMS Oil & Gas was affiliated with ERM/MS&T and Field Services. CMS Oil & Gas owned some production facilities in North America.

7. During the years 2000-2002, CMS Oil & Gas sold some of the gas it produced to ERM/MS&T. It did not sell any gas to Field Services during those years.

8. None of the gas CMS Oil & Gas sold to ERM/MS&T was sold on the Trunkline or TCO pipelines.

ERM/MS&T

9. During the years 2000-2002, ERM/MS&T was a natural gas energy merchant. It served as an intermediary that physically moves natural gas along a delivery grid for wholesale producers and consumers of energy. ERM/MS&T also financially managed the risk of those commodities, and engaged in the speculative trading of energy for profit.

10. During the years 2000-2002, ERM/MS&T did not produce natural gas. Nor did ERM/MS&T own any natural gas wells during this time period.

11. Although ERM/MS&T did not produce natural gas during the years 2000-2002, it did purchase some natural gas produced by CMS Oil & Gas. ERM/MS&T did not purchase natural gas produced by any other affiliated entity during those years.

Moreover, the majority of natural gas purchased by ERM/MS&T was acquired from other sources.

12. Based on my review of ERM/MS&T's transaction data and invoices from CMS Oil & Gas, ERM/MS&T purchased a total of 29,275,797 MMBTUs of natural gas from CMS Oil & Gas at locations on five pipelines. The following table summarizes those purchases:

Pipeline	2000	2001	2002
Trailblazer	0	4,458,704	3,015,956
Texas Gas	4,698,787	3,573,894	1,776,668
Great Lakes	13,000	0	0
Michcon	10,209,315	0	0
CECO	1,529,473	0	0

13. None of the natural gas purchased by ERM/MS&T from CMS Oil & Gas could have been sold on the Trunkline, TCO, SoCal or PG&E pipelines. The TCO, SoCal and PG&E pipelines do not even connect to Trailblazer, Texas Gas, Great Lakes, Michcon and/or CECO. As such, natural gas purchased on those pipelines could not travel on the TCO, SoCal or PG&E pipelines.

14. During the years 2000-2002, ERM/MS&T sold more than 1,650,000,000 MMBTUs of natural gas. That is far more than 56 times the amount it purchased from CMS Oil & Gas (29,275,797 MMBTUs). As such, the vast majority of

ERM/MS&T's sales could not have been gas that CMS Oil & Gas produced.

15. During the years 2000-2002, ERM/MS&T sold natural gas to the following companies, which I understand were pure resellers of natural gas: AEP Energy Services, Inc. ("AEP"); Dynegy Marketing & Trade ("Dynegy"); El Paso Merchant Energy, L.P. ("El Paso"); Enron North American Corp. ("Enron"); ONEOK Energy Marketing and Trading Co. ("ONEOK"); PanCanadian Energy Services, Inc. ("PanCanadian"); and Reliant Energy Services, Inc. ("Reliant"). The following table summarizes ERM/MS&T's sales to those resellers on the Trunkline pipeline. None of these sales were of gas ERM/MS&T purchased from CMS Oil & Gas.

Counterparty	2000	2001	2002
AEP	515,075	3,067,300	2,110,864
Dynegy	224,178	6,386,608.7	2,414,900
El Paso	2,408,010	84,000	102,000
Enron	1,310,860	2,681,451	0
ONEOK	353,460	299,560	1,037,200
PanCanadian	4,164,854	6,000	89,600
Reliant	4,793,008	102,400	239,626

16. During the years 2000-2002, the total amount of sales made by ERM/MS&T to resellers on the Trunkline pipeline was greater than the total amount of gas ERM/MS&T purchased from CMS Oil & Gas.

17. More than 14,574,926 MMBTUs of the gas ERM/MS&T sold to resellers on the Trunkline pipeline during that time period was priced with reference to a published index price. The following table summarizes these transactions:

Dynegy	7,300,000
El Paso	2,060,000
Enron	240,000
ONEOK	750,000
PanCanadian	3,627,985
Reliant	836,941

18. During the years 2000-2002, ERM/MS&T sold at least 220,000 MMBTUs of natural gas to resellers on the SoCal pipeline (approximately 120,000 MMBTUs to AEP; 85,000 MMBTUs to El Paso; and 15,000 MMBTU's to PanCanadian). None of this gas was from CMS Oil & Gas's production.

19. During the years 2000-2002, ER1WMS&T sold at least 697,284 MMBTUs of natural gas to resellers on the PG&E pipeline (approximately 327,586 MMBTUs to Enron; 238,323 MMBTUs to Reliant; and 131,375 MMBTUs to Dynegy). None of this gas was from CMS Oil & Gas's production.

Field Services

20. During the years 2000-2002, Field Services' primary business was in gathering, processing, compressing and treating natural gas. Field Services also bought, sold and traded natural gas on

intrastate and interstate pipelines, and engaged in financially settled transactions related to natural gas. Although Field Services purchased natural gas from the wellhead, those purchases were not from its own production.

21. During the years 2000-2002, Field Services did not produce natural gas. Nor did Field Services own any natural gas wells during this time period.

22. During the years 2000-2002. Field Services did not purchase natural gas produced by any affiliated entity.

23. During the years 2000-2002, Field Services sold natural gas to the following companies, which I understand were pure resellers of natural gas: AEP Energy Services, Inc. ("AEP"); Dynegy Marketing & Trade ("Dynegy"); El Paso Merchant Energy, L.P. ("El Paso"); ONEOK Energy Marketing and Trading Co. ("ONEOK"); Reliant Energy Services, Inc. ("Reliant") Sempra Energy Trading Corporation ("Sempra"); and Western Gas Resources ("Western"). The following table summarizes Field Services' sales to those resellers.

Counterparty	200	2001	2002
AEP	212,674	121,216	768,359
Dynegy	124,677	1,130,837	1,875,981
El Paso	32,900	56,688	190,339
ONEOK	320,143	46,486	262,450
Reliant	283,098	23,556	760,368

Counterparty	200	2001	2002
Sempra	1,717,583	22,102	0
Western	8,250	354,519	9,360

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Jackson, Michigan on December 14, 2009.

/s/ Todd Mortimer
Todd Mortimer

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL Docket No. 1566

Base Case No.
CV-S-03-1431-PMP (PAL)

IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

Case No.
2:05-cv-01331-PMP-PAL

REORGANIZED FLI, INC.

v.

WILLIAMS COMPANIES, INC., et al.

Case No.
2:06-cv-00233-PMP-PAL

LEARJET, INC., et al.

v.

ONEOK, INC., et al.

Case No.
2:07-cv-00987-PMP-PAL

HEARTLAND REGIONAL
MEDICAL CENTER, et al.

v.

ONEOK, INC., et al.

Case No.
2:07-cv-01019-PMP-PAL

ARANDELL CORP., et al.

v.

XCEL ENERGY, INC., et al.

Case No.
2:09-cv-00915-PMP-PAL

NEWPAGE WISCONSIN SYSTEM, INC., et al.

v.

CMS ENERGY RESOURCE MANAGEMENT CO.,
et al.

DECLARATION OF PAULA MOULTON

1. My name is Paula Moulton. My current position is Manager of Rates Recovery and Analysis for Duke Energy Carolinas, LLC. Until February 2006, my position was Manager of Gas Accounting. I personally am familiar with the Gas Marketing System (hereafter "GMS") database that was used by Duke Energy Trading and Marketing LLC ("DETM") to capture and record information about its natural gas transactions, and I have utilized the system as needed in the course of my work. I make this Declaration in support of the Renewed Motion for Summary Judgment filed by DETM and other defendants in these actions. This declaration is based upon my personal knowledge.

2. I have been asked to determine the extent to which DETM purchased natural gas from affiliates of ExxonMobil during the period January 1, 2000 to and including October 31, 2002 (the "Relevant Period"). Those affiliates were MEPUS, ExxonCorp, ExxonCoUSA, ExxonMobOil, Exxon, MobilOil, and ExxonMobil. To do this analysis, I searched the GMS database to locate any natural gas purchases during the Relevant Period from any of these ExxonMobil affiliates. I then collected the resulting data in a summary file. In doing the analysis, I focused on flow data, which is the amount of gas DETM actually paid for and received from ExxonMobil affiliates. The chart attached as Exhibit 1 hereto reflects DETM's purchases of natural gas from all ExxonMobil affiliates delivered during each month of the Relevant Period, shown in MMBtu. The data in this chart reflects *all* of the physical

natural gas DETM purchased during the Relevant Period from an ExxonMobil affiliate, and has a total volume of **885,322,125 MMBtu.** This number differs from the data previously provided in the Declaration of Susan Ray (which reported a slightly lower total volume of 879,666,858 MMBtu).

3. I also have been asked to determine whether DETM purchased any natural gas from Duke Energy Hydrocarbons LLC during the Relevant Period. To do so, I searched the GMS database to locate any natural gas purchases during the Relevant Period from that entity. My search revealed purchases during the Relevant Period by DETM from Duke Energy Hydrocarbons for a total volume of **265,674 MMBtu** of natural gas. This total volume appears broken down by month of delivery in the chart attached as Exhibit I hereto.

4. I also have been asked to determine the extent to which DETM sold natural gas during the Relevant Period to any of the following entities: AEP Energy Services, Inc.; Altrade Transaction, LLC; El Paso Merchant Energy; Enron North America Corporation; Sempra Energy Trading Corporation; Western Gas Resources, Inc.; Southern California Gas Company; PanCanadian Energy Services, Inc.; WD Energy Services, Inc.; Reliant Energy Services, Inc.; ONEOK Energy Marketing and Trading Company, LP; and Dynegy Marketing and Trade. To do so, I searched the GMS database to locate natural gas sale transactions during the Relevant Period with any of these companies. I then collected the resulting data in a summary file. In doing the analysis, I focused on flow data, which is the amount

of gas DETM actually delivered and received payment for. The search revealed total sales of the following volumes of natural gas (in MMBtu) by DETM to those parties during the Relevant Period:

TABLE 1

COUNTERPARTY	DETM SALES VOLUME (MMBtu)
AEP ENERGY SERVICES, INC.	742,861,482
ALTRADE TRANSACTION, L.L.C.	150,367,993
EL PASO MERCHANT ENERGY	289,952,441
ENRON NORTH AMERICA CORP.	473,402,214
SEMPRA ENERGY TRADING CORP.	117,594,213
WESTERN GAS RESOURCES, INC.	52,044,503
SOUTHERN CALIFORNIA GAS COMPANY	30,779,868
PANCANADIAN ENERGY SERVICES, INC.	32,762,166
WD ENERGY SERVICES INC.	17,094,086
RELIANT ENERGY	572,826,912

COUNTERPARTY	DETM SALES VOLUME (MMBtu)
SERVICES, INC.	
ONEOK ENERGY MARKETING AND TRADING COMPANY, L.P.	95,068,504
DYNEGY MARKETING AND TRADE	136,939,567
TOTAL	2,711,693,949 MMBtu

The data in Table 1, above, reflects *all* of the physical natural gas DETM sold during the Relevant Period to each of the foregoing counterparties. The chart attached as Exhibit 1 hereto reflects the total volume of natural gas that DETM delivered during each month of the Relevant Period to these counterparties, shown in MMBtu. It also shows that, during each month of the Relevant Period, DETM delivered to these counterparties more natural gas than it acquired from ExxonMobil affiliates and Duke Energy Hydrocarbons collectively.

5. I also have been asked to review six (6) natural gas transaction confirmations ("Deal Confirmations") for delivery of firm physical gas between DETM and Reliant Energy Services, Inc. True and correct copies of these Deal Confirmations are attached as Exhibit 2 hereto. These Deal Confirmations are business records kept in the

ordinary course of DETM's business. They are dated August 14, 2001 for firm physical gas in volumes totaling 110,000 MMBtu per day (55,000 MMBtu/day sold by DETM to Reliant, and 55,000 MMBtu/day sold by Reliant to DETM), to be delivered during September 2001 at the Texas Gas Transmission delivery point known as "Louisiana — Onshore South," and priced "at index." "At index" means that the price in dollars per MMBtu was based upon the *Gas Daily* midpoint index price for that calendar day. These Deal Confirmations reflect the contracted volumes of index-priced gas that would have been delivered at the time and place reflected in the documents.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on this 16th day of December, 2009 at Houston, Texas.

/s/ Paul Moulton
PAULA MOULTON

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MDL Docket No. 1566
Base Case No. 2:03-cv-01431-PMP-PAL

IN RE WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

THIS DOCKET RELATES TO:

ALL CASES

DECLARATION OF GREGORY R. LEONARD, PhD. IN SUPPORT OF DEFENDANTS' JOINT RENEWED MOTION AND MOTION FOR SUMMARY JUDGMENT BASED ON FEDERAL PREEMPTION

Declaration of Gregory R. Leonard, PhD.

1. My name is Gregory Leonard. I am a Principal at Cornerstone Research, My address is 1919 Pennsylvania Ave., N.W., Suite 600, Washington, DC 20006.

2. I have over nine years of experience consulting in the energy industry including the natural gas industry. I have provided consulting services on a wide range of topics including topics relying on the analysis of corporate transaction databases. I have attached a copy of my curriculum vitae as Exhibit A.

3. I was asked by counsel for AEP Energy Services, Inc. ("AEPES") to review certain transaction data from AEPES's Zainet data system[1] produced in this proceeding and to identify index-priced sales of physical natural gas by AEPES to certain counterparties that resulted in delivery between January 1, 2000 and October 31, 2002, The data show that AEPES made at least 1,990 sales totaling at least 614 million mmBtu of index-priced natural gas for delivery between January 1, 2000 and October 31, 2002 with the counterparties shown in Table 1.

4. I was asked by counsel for Coral Energy Resources, L.P. ("Coral") to review certain Coral transaction data[2] produced in this proceeding and to identify index-priced sales of physical natural gas by Coral to certain counterparties at trading locations

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[1] AEP51064

[2] CER0241201-2

within the Permian and San Juan basins that resulted in delivery between January 1, 2000 and October 31, 2002. The databases show that Coral made at least 189 sales totaling at least 34 million mmBtu of index-priced natural gas at the Permian and San Juan basins for delivery between January 1, 2000 and October 31, 2002 with the counterparties shown in Table 2.

5. I was asked by counsel for e-prime, Inc. ("e-prime") to review certain e-prime transaction data[3] produced in this proceeding and to identify index-priced sales of physical natural gas by e-prime to certain counterparties that resulted in delivery between January 1, 2000 and October 31, 2002. The data show that e-prime made at least 682 sales totaling at least 213 million mmBtu of index-priced natural gas for delivery between January 1, 2000 and October 31, 2002 with the counterparties shown in Table 3.

6. I was asked by counsel for RRI Energy Services, Inc. ("RRI") to review certain RRI transaction data[4] produced in this proceeding and to identify index-priced sales of physical natural gas by RRI to certain counterparties that resulted in delivery between January 1, 2000 and October 31, 2002. The data show that Rill made at least 3,093 sales totaling at least 1.1 billion mmBtu of index-priced natural gas for delivery between

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[3] EPRIME 0110706

[4] RELMDL0113217

January 1, 2000 and October 31, 2002 with the counterparties shown in Table 4.

7. In total, the databases for AEPES, Coral, e-prime, and RRI that I examined show at least 5,954 index-priced sales totaling at least 1.9 billion mmBtu of physical natural gas with the counterparties as reflected in Tables 1-4.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 16th of December, 2009, at Washington, D.C.

/s/ Gregory R. Leonard, PhD.
Gregory R. Leonard, PhD.

PETITIONER'S BRIEF

No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

[additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional counsel:

DOUGLAS R. TRIBBLE
KEVIN M. FONG
PILLSBURY WINTHROP
SHAW PITTMAN LLP
Four Embarcadero Center,
22nd Floor
San Francisco, CA 94111
(415) 983-1000

MICHAEL J. KASS
VLP LAW GROUP LLP
739 Calmar Avenue
Oakland, CA 94610
(510) 629-6089

Counsel for the defendant Dynegy entities

MARK E. HADDAD
MICHELLE B. GOODMAN
NITIN REDDY
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the defendant CMS entities

JOSHUA D. LICHTMAN
FULBRIGHT &
JAWORSKI LLP
555 South Flower Street,
Forty-First Floor
Los Angeles, CA 90071
(213) 892-9200

Counsel for Shell Energy North America (US), L.P.

AARON M. STREETT
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1234

Counsel for GenOn Energy, Inc.

JOEL B. KLEINMAN
ADAM PROUJANSKY
LISA M. KAAS
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, D.C. 20006
(202) 420-2200

Counsel for Duke Energy Trading and Marketing, L.L.C.

OLIVER S. HOWARD
AMELIA A. FOGLEMAN
CRAIG A. FITZGERALD
GABLE GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4800

Counsel for the defendant ONEOK entities

QUESTION PRESENTED

The Natural Gas Act occupies the field as to matters within its scope, preempting state regulation aimed at practices that directly affect the wholesale natural gas market. Respondents brought state-law claims against natural gas companies, seeking to impose liability based on industry practices that directly affected prices in the wholesale market. And yet the Ninth Circuit held that Respondents' claims were not preempted because Respondents' alleged damages resulted from retail gas purchases, which fall outside federal jurisdiction.

The question presented is: Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit:

1. AEP Energy Services; American Electric Power Company, Inc.; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Marketing & Trading Company; Williams Power Company, Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc., Petitioners on review, were defendants-appellees below.[1]

2. Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Merricks, Inc.; Sargento Foods, Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; Newpage Wisconsin System, Inc.; Reorganized FLI, Inc.; Sinclair Oil Corporation; Heartland Regional Medical Center; Prime Tanning Corp.; Northwest Missouri State University; and Multiut Corporation, Respondents on review, were plaintiffs-appellants below.

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[1] The Petitioners' corporate names are reproduced as they were typically listed in the docket below. Some Petitioners have undergone corporate reorganizations (and in some instances were sued under their names as reorganized). For purposes of recusal and completeness, updated corporate information is provided in the corporate disclosure statement at pp. iv-vi, *infra*.

3. Duke Energy Corporation; CMS Energy Corporation; and Reliant Energy, Inc., were defendants-appellees below.

4. Williams Merchant Services Company, Inc. was a defendant-appellee below. It was later known as Williams Merchant Services Company LLC, but that entity was dissolved on October 2, 2013.

RULE 29.6 DISCLOSURE STATEMENT

AEP Energy Services, Inc. is an indirect, wholly owned subsidiary of American Electric Power Company, Inc., which is a publicly owned corporation.

American Electric Power Company, Inc. is a publicly owned corporation. American Electric Power Company, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of American Electric Power Company, Inc.'s stock.

CMS Marketing Services and Trading Company is now known as CMS Energy Resources Management Co. It is a wholly owned indirect subsidiary of CMS Energy Corp., a publicly traded company.

CMS Field Services Inc. was a former wholly owned indirect subsidiary of CMS Energy Corp. CMS Field Services Inc. later changed its name to Cantera Gas Company and eventually was acquired by Copano Energy, L.L.C. Copano Energy, L.L.C. was acquired by Kinder Morgan Energy Partners LP, which is publicly traded. No other public company holds more than 10% of Kinder Morgan Energy Partners LP's stock.

Shell Energy North America (US), L.P., is the successor in interest to Coral Energy Resources, L.P. Shell Energy North America is not itself a corporation, and has no direct publicly owned parent corporation, but is indirectly wholly owned by Royal Dutch Shell plc. Royal Dutch Shell plc is registered as a public company, but no publicly held corporation owns more than 10% of its stock.

Duke Energy Trading and Marketing, L.L.C. has as its parent companies DETMI Management, Inc. (60% owner) and Mobil Natural Gas, Inc. (40% owner).

Neither DETMI Management, Inc. nor Mobil Natural Gas, Inc. is a publicly held corporation. However, DETMI Management, Inc. and Mobil Natural Gas, Inc. are indirectly, wholly owned by Duke Energy Corporation and ExxonMobil Corporation, respectively, both publicly held corporations.

Dynegy Marketing and Trade is now Dynegy Marketing and Trade, LLC and is an indirect subsidiary of Dynegy Inc. DMT G.P. L.L.C. was previously merged into another entity that is now Dynegy Power Marketing, LLC, and is an indirect subsidiary of Dynegy Inc. Dynegy GP Inc. was previously merged into another entity that was Dynegy Holdings LLC, which was subsequently merged into Dynegy Inc. as a result of Dynegy Holdings LLC's and Dynegy Inc.'s bankruptcy proceedings. Dynegy Illinois Inc. was dissolved in June 2009. Prior to its dissolution, Dynegy Illinois Inc. was a wholly owned subsidiary of Dynegy Inc. Franklin Advisers, Inc., which is a subsidiary of Franklin Resources Inc., a publicly traded company, owns more than 10% of Dynegy Inc.'s common stock.

El Paso Corporation has changed its name to El Paso LLC. El Paso LLC and El Paso Merchant Energy L.P. are indirect subsidiaries of Kinder Morgan, Inc., a publicly held corporation.

ONEOK, Inc. is a publicly held corporation. No parent entity or other publicly held corporation owns 10% or more of its outstanding stock.

ONEOK Energy Services Company, L.P., formerly known as ONEOK Energy Marketing & Trading Company, L.P., is an indirectly wholly owned subsidiary of ONEOK, Inc.

After the underlying lawsuits were filed, Reliant Energy, Inc. and Reliant Energy Services, Inc. underwent a series of name changes and corporate transactions. Reliant Energy, Inc. changed its name to RRI Energy, Inc. and subsequently merged with Mirant Corp. to become GenOn Energy, Inc.; 100% of its stock is now owned by NRG Energy, Inc. Reliant Energy Services, Inc. changed its name to RRI Energy Services, Inc. and subsequently changed its form from a corporation to a limited liability company, which is now known as RRI Energy Services, LLC. GenOn Energy, Inc. indirectly owns 100% of the stock of RRI Energy Services, Inc., which is now known as RRI Energy Services, LLC. T. Rowe Price Associates, Inc. and Capital Research Global Investors own more than 10% of the shares of NRG Energy, Inc.

The Williams Companies, Inc. is a publicly held Delaware corporation. No publicly held corporation owns more than 10% of its stock.

Williams Energy Marketing & Trading Company, subsequently known as Williams Power Company, Inc., then Williams Gas Marketing, Inc., and now as WPX Energy Marketing, LLC, is a wholly owned subsidiary of WPX Energy, Inc. As of December 31, 2011, WPX Energy, Inc. was no longer an affiliate of The Williams Companies, Inc.

e prime, Inc. is an indirect wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Northern States Power Company is a wholly owned subsidiary of Xcel Energy Inc., a publicly held corporation.

Xcel Energy Inc. is a publicly held corporation with no parent or corporate owner.

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IN THE

Supreme Court of the United States

No. 13-271

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 715 F.3d 716. Pet. App. 1a. The District Court's July 18, 2011 opinion granting Petitioners summary judgment is unreported but available at 2011 WL 2912910. *Id.* at 64a. The District Court's November 2, 2009 opinion regarding preemption is unreported. *Id.* at 124a. Its initial May 14, 2008 opinion denying Petitioners summary judgment is unreported. J.A. 37-62.

JURISDICTION

The Ninth Circuit entered judgment on April 10, 2013. On June 20, 2013, Justice Kennedy extended the time to petition for certiorari to and including Saturday, August 24, 2013, and the petition was timely filed under Rule 30.1 on August 26, 2013. The petition

was granted on July 1, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional provisions and statutes are set forth in the addendum. App. 1a-4a.

INTRODUCTION

For more than 75 years, the Natural Gas Act ("NGA") has placed the wholesale natural gas market under exclusive federal control. By occupying the field and so precluding state regulation, the NGA ensures that the nation's critical natural gas industry develops under a uniform and predictable regulatory scheme.

This case requires only a straightforward application of established NGA preemption doctrine. The NGA gives the Federal Energy Regulatory Commission ("FERC") exclusive authority to regulate (i) the rates for many wholesale gas transactions and (ii) any "practice" by a "natural gas company" that directly "affect[s]" those rates. 15 U.S.C. §§ 717(b), 717d(a); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). Respondents allege that Petitioners, all of whom are FERC-jurisdictional natural gas companies, engaged in a practice called "index manipulation." Index manipulation directly affects wholesale gas rates within FERC's jurisdiction. FERC therefore has exclusive power to regulate that practice. Recognizing as much, FERC exercised its power by promulgating in the Code of Federal Regulations a code of conduct governing index manipulation and by revoking the marketing certificates of natural gas companies that it found had engaged in the practice.

That regulatory action underscores what was already the case even before FERC acted: Any *state* regulation

of index manipulation by such companies was ousted by the NGA. After all, it is "well settled" that "Congress occupied the field" in the NGA, and therefore that states cannot regulate in any area where the NGA reaches. *Schneidewind*, 485 U.S. at 305. In other words, "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment). FERC has jurisdiction over index manipulation by the natural gas companies it regulates; accordingly, states do not.

Respondents nevertheless filed a bevy of class-action suits, seeking to use state law to regulate the very same index-manipulation practices FERC was regulating. Respondents alleged that Petitioners engaged in index manipulation and that it drove up the prices Respondents paid in retail gas transactions. Asserting state-law causes of action, they sought to punish Petitioners through massive verdicts.

Those claims are preempted. As this Court has made clear on several occasions, state-law regulation falls within the field occupied by the NGA when it is "directed at * * * things over which FERC has comprehensive authority" or when it "amounts to a regulation" of matters within the federal field. *Schneidewind*, 485 U.S. at 308. Respondents' lawsuits fall squarely within those descriptions. Their state-law claims target index manipulation by wholesale sellers within FERC's jurisdiction, and any relief ordered pursuant to those suits necessarily would regulate that practice. Under well-settled field preemption principles, Respondents' lawsuits cannot proceed. The Ninth Circuit's contrary conclusion—which flies in the

face of this Court's NGA precedents—should be reversed.

STATEMENT

A. Statutory Background

1. For the last three-quarters of a century, Congress has viewed "uniformity of regulation" as essential to the effective operation of the nation's interstate energy markets. *Northern Natural Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U.S. 84, 91 (1983). Before this time, the states had regulated local gas transactions, but each state's sphere of authority ended at the state line. *See, e.g., Public Util. Comm'n of R.I.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927). Congress accordingly enacted the NGA in 1938 to provide "a comprehensive scheme of federal regulation" of interstate gas transportation and sales. *Northern Natural*, 372 U.S. at 91. These same uniformity principles are equally applicable, and equally important, to electricity wholesalers regulated under the parallel Federal Power Act ("FPA").

Section 1(b) of the NGA established federal control over "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale for ultimate public consumption," and "natural gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b). The NGA, in other words, gave the federal government control over wholesale gas transactions and companies that engage in them. At the same time, Congress preserved the states' role in regulating local activities by providing that the NGA would "not apply to any other transportation or sale of natural gas * * * or to the production or gathering of natural gas." *Id.*

To ensure effective regulation of areas within federal control, the NGA vested an expert federal agency—the Federal Power Commission, later renamed FERC—with "a variety of powers." *Schneidewind*, 485 U.S. at 301. Among other things, Section 4(a) of the NGA grants FERC "extensive control over the rates at which * * * gas is sold for resale." *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 507 (1942). It also requires FERC to ensure those rates are "just and reasonable." 15 U.S.C. § 717c. To carry out that mandate, Section 5 of the NGA empowers FERC to regulate natural gas companies with respect to "any rule, regulation, practice, or contract * * * affecting" a "rate * * * subject to the jurisdiction of the Commission." *Id.* § 717d(a).

2. Starting in the 1970s, Congress amended the NGA to remove from FERC's rate-setting jurisdiction certain portions of the wholesale market, including "first sales," which are "sales of natural gas that are not preceded by a sale to [a] * * * pipeline, local distribution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007); *see, e.g.*, Natural Gas Policy Act, Pub. L. No. 96-621, 92 Stat. 3350 (1978), Wellhead Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989). FERC therefore now exercises control over some but not all of the wholesale gas market. In industry parlance, wholesale natural gas transactions within federal control are termed "jurisdictional sales," and natural gas companies that engage in those transactions are called "jurisdictional sellers." Matters excluded from FERC's authority are called "non-jurisdictional."

It is "well settled" that through the NGA "Congress occupied the field of matters relating to wholesale sales

and transportation of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 305. Moreover, this Court has confirmed that the limitations Congress imposed on FERC's jurisdiction in the statutes discussed above were deregulatory and did not diminish the NGA's field-preemptive scope. As it explained, Congress's "decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 423 (1986) ("*Transcon*").

B. Regulatory Background

1. In 1992, FERC began issuing "blanket certificates" to interstate pipelines and marketers to sell wholesale natural gas at market rates. *See* 57 Fed. Reg. 57,952 (Dec. 8, 1992). FERC explained that this approach would "foster[] a competitive natural gas sales market where merchants of natural gas are influenced by market forces." *Id.* at 57,953. But it emphasized that it would continue to "monitor the operation of the market" so that it could take any necessary steps to combat market abuses. *Id.* at 57,958.

2. With gas sales left to market forces, private trade publications such as *Gas Daily* and *Inside FERC* increasingly began to track and compile information about gas transactions. J.A. 124-125. The publications worked like this: Many gas sales agreements contain a fixed price per unit of gas set at the time of contracting. J.A. 125. The trade publications solicited data from market participants on these fixed prices and other contract terms. J.A. 124-125, 148, 170-174. They then published "indices" summarizing market rates for natural gas. J.A. 124-125.

Before long, industry participants began entering into contracts that used these "index prices" as the rate for gas, rather than negotiating a specific fixed price. For example, a contract to deliver gas at the location known as "Texas Gas SL-Louisiana-Onshore South" might have a price term of "Index of Gas Daily–Midpoint (Texas Gas SL-Louisiana-Onshore South)" for the date "09/01/2001." *See* J.A. 641. This meant that the contract price would be the index price *Gas Daily* published for the Texas Gas SL-Louisiana-Onshore South location on September 1, 2001. *Id.* By directly incorporating the index price in this manner, the contract assured that the index price, whatever it turned out to be, would function as the actual rate for the transaction. During the time period at issue, both jurisdictional (wholesale) and non-jurisdictional (*e.g.*, retail) sales of natural gas were routinely priced with reference to the indices. J.A. 150-151; *see also, e.g.*, J.A. 637-641; J.A. 645 (documenting thousands of jurisdictional index-rate contracts between 2000 and 2002).

3. In 2002, FERC initiated an "investigation into whether any entity manipulated prices" in natural gas markets. *Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates*, 103 F.E.R.C. ¶ 61,343, at 62,295 (June 25, 2003). That probe prompted FERC to regulate several aspects of jurisdictional sellers' index-reporting practices.

a. First, FERC issued a policy statement regarding the natural gas indices. *Policy Statement on Natural Gas and Electric Price Indices*, 104 F.E.R.C. ¶ 61,121 (Apr. 30, 2003). It said it was "concern[ed]" about "the degree of reliance on index-based contracts as opposed to fixed-price contracts." *Id.* at 61,404. "[M]any

natural gas producers often sell with reference to an index and * * * many local distribution company purchasers buy at index-linked prices in lieu of negotiating fixed prices." *Id.* Given that "index dependencies" had "permeate[d] the energy industry," FERC stated that "the indices must be robust and accurate and have the confidence of market participants for such markets to function properly and efficiently." *Id.*

To that end, FERC's policy statement established standards for price-reporting practices, including "minimum standards for reporting transaction data to index developers." *Id.* at 61,408. FERC explained that industry participants complying with these standards would enjoy "safe harbor protection for good faith reporting of transactions data" and would "not be investigated or subjected to administrative penalties for inadvertent mistakes made in the course of reporting energy transaction information." *Id.* at 61,404. The Commission emphasized that its policy statement was intended to "provide a measure of regulatory certainty to the process of reporting transaction data." *Id.*

b. Around the same time, FERC ordered a number of jurisdictional sellers, including some Petitioners, to submit information concerning their index-reporting practices. *Order Directing Submission of Information With Respect To Internal Processes for Reporting Trade Data*, 103 F.E.R.C. ¶ 61,089 (July 29, 2003). FERC explained that "many gas * * * jurisdictional transactions are based on the published indices," and accordingly "the Commission needs to be sure that the indices are accurate and not subject to manipulation." *Id.* at 61,286. To that end, FERC gathered information from the companies as part of its "ongoing reform of

the natural gas * * * index publishing process." *Order Accepting Submission of Information With Respect To Internal Processes for Reporting Trading Data*, 104 F.E.R.C. ¶ 61,153, at 61,653 (June 25, 2003).

c. On June 25, 2003, FERC terminated Enron's blanket marketing certificate, in essence prohibiting it from engaging in the natural gas marketing and trading business. *See* 103 F.E.R.C. at 62,295. FERC found that Enron had engaged in misconduct, including "wash sales," where it traded gas back and forth in an alleged effort to create an illusion of higher demand. *Id.* at 62,303. If this behavior "affect[ed] the * * * index price reported for a market," FERC explained, it would also "affect the magnitude of payments on a contract linked to the index price." *Id.* Thus, the Commission deemed it necessary to revoke Enron's market-based rate authorities "to fulfill the Commission's obligation, pursuant to * * * Sections 4 and 5 of the NGA to protect natural gas customers from unjust and unreasonable rates." *Id.* at 62,295 (citations omitted).

d. Several months later, FERC promulgated a final rule amending all blanket marketing certificates held by jurisdictional sellers to require that they adhere to a code of conduct governing their index-related practices. 68 Fed. Reg. 66,323 (Nov. 26, 2003) ("Code of Conduct"). The Commission explained that it had designed the Code to be "clearly defined so that it does not create uncertainty, disrupt competitive commodity markets or simply prove ineffective." *Id.* at 66,324.

Among other "clearly-delineated" provisions, FERC specifically prohibited reporting false data to index publishers and wash trading. *Id.* at 66,324. The Commission noted that "all sellers of natural gas will

not be under the same set of regulations" because the Code of Conduct applied only to jurisdictional sellers (*i.e.*, the "natural gas companies" referenced in Section 1(b) of the NGA, such as Petitioners). *Id.* at 66,326. But "[t]he fact that the Commission does not regulate the entire natural gas market" did not "compel [it] to refrain from exercising its authority over that portion of the gas market which is within its jurisdiction to prevent the manipulation of prices." *Id.*

In response to a request for rehearing, FERC rejected arguments that it had "failed to meet its burden of proof under section 5 of the [NGA] to justify the imposition of" the Code of Conduct on all jurisdictional sellers. *Order Denying Rehearing of Blanket Sales Certificates Order*, 107 F.E.R.C. ¶ 61,174, at 61,689 (May 19, 2004). The Commission emphasized that it had ample authority to adopt the index-manipulation rules pursuant to Section 5 because "the prohibited practices are unjust and unreasonable, and * * * their explicit prohibition is necessary to ensure that market-based sales of gas will be adequately protected from manipulation and, therefore, will be just and reasonable." *Id.* at 61,690.

4. FERC took additional steps to regulate index manipulation after Congress expanded the Commission's authority in the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) ("EPAct"). Whereas FERC previously could only regulate *jurisdictional sellers*' manipulative conduct, the EPAct authorized FERC to regulate "*any* entity" engaging in that conduct. 15 U.S.C. § 717c-1 (emphasis added). In a final rule implementing the EPAct, FERC explained that, although the statute had not altered the "transactions subject to the Commission's jurisdiction," it had expanded the

entities subject to regulation to include any market participants engaged in manipulation in connection with a jurisdictional sale. 71 Fed. Reg. 4244, 4247 (Jan. 26, 2006). FERC further noted that the new regulations were "not intended to modify or supersede the Commission's Policy Statement on Natural Gas and Electric Price Indices," which continued to "provide[] guidance on how market participants should report price transaction information to price index developers." *Id.* at 4256-57.

C. Procedural History

1. In the wake of FERC's 2003-2004 index-manipulation orders, various commercial and industrial end users of natural gas, including Respondents, sued Petitioners, who are jurisdictional sellers, on state-law antitrust theories. Although Respondents filed separate suits in several different states, the allegations in each complaint were similar. Respondents alleged that Petitioners conspired to engage in index-manipulation practices—namely, wash trading and reporting false information to index publishers—that inflated index prices for gas. Pet. App. 15a; J.A. 298-299, 304-305. As a result, Respondents allegedly paid higher prices because they bought gas in retail transactions with prices pegged to the indices. Pet. App. 14a-15a.

Respondents mainly contended that Petitioners' alleged actions violated various states' antitrust and consumer-protection laws. *E.g.*, J.A. 244-245. Moreover, in many cases they maintained that state law authorized recovery of "the full amount of the payments the plaintiffs made for natural gas" as a "punitive" measure, even if the alleged practices only caused a minor increase in the purchase price. *E.g.*,

J.A. 245. Invoking these generous state-law remedies, Respondents looked for a payday that—in the aggregate—could total billions of dollars.

2. After the cases were transferred into a multi-district litigation in the District of Nevada, Petitioners moved for summary judgment on the ground that Respondents' state-law claims were barred by field preemption. The argument was based on an undisputed fact: Wholesale contracts, like retail contracts, routinely used published index prices as their price term. Pet. App. 111a; J.A. 124-128, 170-175, 632, 640, 645; *E. & J. Gallo Winery*, 503 F.3d at 1031-32 (describing the indices' "wide use as reference points in pricing natural gas sales * * *, including most of the transactions subject to FERC's jurisdictional authority"). Therefore, if alleged false reports or wash sales inflated a published index price, those practices necessarily would have inflated prices in *both* wholesale and retail transactions. Pet. App. 110a-111a; Learjet C.A. Opening Br. 11-12. Respondents' attempt to impose state-law regulation through lawsuits thus was directed at a subject matter the NGA's plain text places within the federal field—namely, "practice[s] * * * affecting" jurisdictional gas rates. 15 U.S.C. § 717d(a). Indeed, FERC had invoked that authority on multiple occasions to regulate the precise practices on which Respondents' state-law claims are premised. *See, e.g.*, Code of Conduct, 68 Fed. Reg. at 66,324. For these reasons, Petitioners maintained that the state-law suits could not proceed.

3. The District Court agreed that Respondents' claims were preempted.[2] The court observed that Respondents did not "seriously dispute that jurisdictional rates are set by reference to the indices"—a conclusion that squared with FERC's determination "after a fact-finding investigation, that jurisdictional rates were set at index during the relevant time period." Pet. App. 111a n.19; *see supra* at 8 (quoting FERC findings). Because the indices "are the method by which jurisdictional rates are set," Pet. App. 112a, the court found that Petitioners' alleged index-manipulation practices directly affected those jurisdictional rates. *Id.* at 110a-112a. It accordingly concluded that the alleged index-manipulation practices were subject to FERC's exclusive jurisdiction and that Respondents' claims—which attempted to regulate the same practices through state law—were preempted. *Id.* at 75a.

In reaching this determination, the District Court rejected Respondents' argument that their claims were not preempted because they purchased gas in retail transactions. The alleged index manipulation could not be parsed in this manner, the court reasoned,

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[2] The District Court initially denied Petitioners' motion to dismiss because the parties disputed whether Petitioners were jurisdictional sellers subject to FERC regulation. J.A. 73-74. After additional discovery, the District Court determined that Petitioners qualified as jurisdictional sellers during the relevant time period—*i.e.*, that each Petitioner had made wholesale sales that were not "first sales." Pet. App. 81a-102a. Considerable evidence supported that finding, and Respondents did not challenge it in the Ninth Circuit or in their briefs in opposition; thus, the issue is settled. *See Schneidewind*, 485 U.S. at 295 n.1 (declining to question party's status as a jurisdictional seller where opposing party abandoned argument challenging that status).

because the exact same conduct would have simultaneously affected wholesale and retail rates in precisely the same way. *Id.* at 110a-111a. Thus, although "FERC ha[d] no jurisdiction over [Respondents'] non-jurisdictional transactions," the agency "does have exclusive jurisdiction over any practice by a jurisdictional seller that directly affects a jurisdictional rate." *Id.* at 75a. The court further explained:

> That FERC has such jurisdiction is demonstrated not only by FERC's actual exercise thereof in relation to these practices, but by the fact that the Court would have little trouble rejecting a challenge to FERC's jurisdiction to prohibit jurisdictional sellers from engaging in false price reporting, wash trades, and other collusive or manipulative conduct that affected the price mechanism by which jurisdictional rates are set. * * * [M]anipulation of the indices is not insignificant or tangential to jurisdictional rates. Although the indices are not themselves jurisdictional rates, they are the method by which jurisdictional rates are set and embody jurisdictional rates. Thus, manipulation of the indices directly affects jurisdictional rates.

Id. at 111a-112a (footnote omitted). "Because FERC's jurisdiction is exclusive where it exists," the District Court concluded that "any state law claims based on any such practices are preempted." *Id.* at 75a.

4. Respondents appealed to the Ninth Circuit, which reversed the District Court's preemption holding. The court of appeals concluded that "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction." *Id.* at 28a. Under this approach to preemption, it did not

matter that the alleged practices upon which Respondents based their claims—index manipulation—directly affected jurisdictional rates. Nor did it matter that FERC had the power to and in fact did regulate these practices. All that mattered for preemption purposes, in the Ninth Circuit's view, was that Respondents bought their gas at retail. *See id.*

The Ninth Circuit did not dispute that FERC's jurisdiction is exclusive where it exists. Nonetheless, the court identified what it believed were "two significant flaws" in the argument "that FERC had jurisdiction over the market manipulation at issue." *Id.* at 37a. First, pointing to the EPAct, the court invoked the "canon of statutory interpretation that counsels against reading acts of Congress to be superfluous" and reasoned that "Congress enacted the relevant provision of the EPA[ct] *because* FERC did not already have regulatory authority over the anticompetitive conduct at issue." *Id.* at 37a-38a. Second, the Ninth Circuit believed "a close reading" of the Code of Conduct revealed "that FERC limited the application of the Code to sales within its jurisdiction." *Id.* at 38a. The court accordingly green-lighted Respondents' state-law suits because, in its view, the NGA did "not grant FERC jurisdiction over claims arising out of false price reporting and other competitive behavior associated with nonjurisdictional sales." *Id.* at 38a-39a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The NGA preempts Respondents' state-law suits. This Court has long interpreted the NGA to occupy the field with respect to both jurisdictional gas rates and practices by jurisdictional sellers that directly affect

those rates. Index-reporting practices directly affect jurisdictional rates because wholesale contracts within FERC's jurisdiction routinely incorporate index prices as the relevant price term. FERC thus has repeatedly and properly regulated jurisdictional sellers' index reporting practices in accordance with its statutory authority. FERC's authority over those practices is exclusive: "States may not regulate in areas where FERC has properly exercised its jurisdiction to * * * insure that agreements"—or, in this case, practices—"affecting wholesale rates are reasonable." *Mississippi Power*, 487 U.S. at 374.

Because the NGA occupies the field of index-reporting practices by jurisdictional sellers, Respondents may not maintain state-law suits that will have the effect of regulating those same practices. This Court has held that a state regulation falls within the field occupied by the NGA when it is "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308. Respondents' claims meet that description because their suits seek to impose liability under state law based on index-reporting practices that the NGA places under exclusive federal control.

Respondents' suits also create an imminent risk that state law will interfere with federal regulatory prerogatives, further demonstrating that the claims are preempted. FERC's orders regulating index-reporting practices sought to give jurisdictional sellers clear rules to guide their conduct. Respondents' use of state law to impose liability for those same practices threatens to undermine that uniform regulatory scheme and replace it with a morass under which individual states can impose their own conflicting standards. Even if particular conduct would pass

muster under FERC's standards, a lay jury might impose liability and sanctions under state law far exceeding those permitted by federal law. And under the Ninth Circuit's approach, this risk of collision extends not only to index-related practices but to any conduct that directly and simultaneously affects retail and wholesale prices. The NGA was enacted to avoid this regulatory chaos. Under a straightforward application of this Court's precedents, Respondents' claims are preempted.

II. The Ninth Circuit's contrary conclusion is erroneous. Emphasizing that Respondents bought gas at retail and that FERC has no jurisdiction over retail sales, the Ninth Circuit held that state law is not preempted when a plaintiff's claim is "associated with" or "aris[es] out of" non-jurisdictional transactions. Pet. App. 28a, 39a. But that approach is contrary to this Court's cases. To enforce the line between state and federal jurisdiction, this Court considers whether the practice at issue *directly affects* jurisdictional rates. This preserves state authority over matters with only attenuated effects on jurisdictional rates. But it does not save Respondents' claims because index-reporting practices directly affect jurisdictional rates. Indeed, Respondents conceded this point below. Although the Learjet Respondents have belatedly argued that the effect was indirect, that claim is both waived and meritless in light of the record evidence demonstrating that index prices literally functioned as "the rate" of gas in jurisdictional contracts linked to the indices.

The remaining justifications the Ninth Circuit offered to support its approach to preemption suffer from similar flaws. The court's decision permitting Respondents' suits to proceed should be reversed.

ARGUMENT

I. THE NGA PREEMPTS RESPONDENTS' STATE-LAW CLAIMS.

The Supremacy Clause of the Constitution "provides a clear rule that federal law 'shall be the supreme Law of the Land.'" *Arizona* v. *United States*, 132 S. Ct. 2492, 2500 (2012) (quoting U.S. Const. art. IV, cl. 2). Even absent an express preemption provision, state law must yield when Congress has "indicate[d] an intent to occupy a given field." *Schneidewind*, 485 U.S. at 300. For decades, this Court has recognized that the NGA reflects that intent. It is "well settled" that "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Id.* at 305. The NGA thus "leaves no room either for direct state regulation" in the field or for state regulation that would "achieve the * * * result" of regulating in that field. *Northern Natural*, 372 U.S. at 91. Thus, even when state regulations nominally involve some topic outside the NGA's reach, they are preempted if their regulatory effects are "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308; *accord Transcon*, 474 U.S. at 419 (finding preemption when state law was "aimed directly at" jurisdictional transactions).

This is such a case. Under Section 5(a) of the NGA, FERC has comprehensive authority over jurisdictional sellers' practices that directly affect wholesale gas rates. Index manipulation directly affects jurisdictional rates because the indices "are the method by which jurisdictional rates are set and embody jurisdictional rates." Pet. App. 112a; *accord* 103 F.E.R.C. at 62,303 (same finding by FERC). FERC thus has exclusive authority to regulate those

practices; indeed, FERC repeatedly *has* regulated them. Respondents' state-law claims, which seek to impose liability for the very same practices, are preempted.

A. The NGA Occupies The Field Of Practices—Including Index Manipulation—That Directly Affect Jurisdictional Rates.

1. "The NGA long has been recognized as a 'comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.' " *Schneidewind*, 485 U.S. at 300 (quoting *Northern Natural*, 372 U.S. at 91) (some internal quotation marks omitted). The statute charges FERC with the responsibility to ensure that wholesale rates are just and reasonable, 15 U.S.C. § 717c, and grants the agency "a number of tools" to effectuate that mandate. *Schneidewind*, 485 U.S. at 301. Chief among these is FERC's authority under Section 5(a) to regulate "any rule, regulation, practice, or contract * * * affecting" wholesale gas rates. 15 U.S.C. § 717d(a).

This Court has long made clear that the NGA's field-preemptive effect sweeps as broadly as the NGA itself. The statute therefore preempts state regulation not only of jurisdictional rates themselves, but also of practices and contracts directly affecting those rates. As the Court explained in *Mississippi Power*, "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." 487 U.S. at 374.[3] There " 'can be no divided

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[3] *Mississippi Power* was a FPA preemption case, but "the relevant provisions of [the FPA and the NGA] are in all material respects substantially identical," and this Court has an "established

authority' " when "[C]ongress has established an exclusive form of regulation." *Arkansas La. Gas Co.*, 453 U.S. at 580 (citation omitted). Accordingly, "[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction to * * * insure that" matters "affecting wholesale rates are reasonable." *Mississippi Power*, 487 U.S. at 374.

Although the authority granted by Section 5(a) is one of FERC's "substantial powers," it is not unlimited: The effect on wholesale rates must be direct. *Schneidewind*, 485 U.S. at 304, 308; *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493, 514, 517-518 (1989); *see infra* at 35-37 & n.5. As FERC has explained in interpreting the scope of its authority, Section 5(a) does not reach a regulation, practice, or contract "that is only tangentially related to jurisdictional rates." *Order Granting in Part and Denying in Part Requests for Clarification and Rehearing*, 119 F.E.R.C. ¶ 61,076, at 61,636 (Apr. 20, 2007). Section 5(a) does, however, empower FERC to regulate any "practices that directly affect or are closely related to" wholesale rates. *Order on Rehearing and Clarification*, 139 F.E.R.C. ¶ 61,132, at ¶ 358 (May 17, 2012) (internal quotation marks omitted). With respect to those practices, state law is preempted.

2. The index-manipulation practices at issue in this case fall within the field occupied by the NGA. Wholesale contracts for gas regularly incorporate index prices as the rate for gas. *See supra* at 7. Thus, any practices affecting an index price directly affect the

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practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

rate paid in jurisdictional gas transactions. *See* Pet. App. 110a-112a. For example, if wash trades or fictional price reports cause an index publisher to report an inflated price for gas, those practices will inevitably boost the rate paid in all wholesale contracts pegged to that index. *See* 103 F.E.R.C. at 62,303 (observing that conduct that "affect[s] the * * * index price reported for a market" will "affect the magnitude of payments on a contract linked to the index price"). Because the indices are used to set jurisdictional rates, Pet. App. 112a, any manipulative conduct by jurisdictional sellers that alters the indices falls within FERC's authority over practices affecting wholesale gas rates.

FERC's repeated exercise of jurisdiction over index-manipulation practices proves the point. Again and again, FERC has invoked its Section 5(a) authority to regulate jurisdictional sellers' index-related conduct, from enacting a policy statement setting forth standards of behavior, 104 F.E.R.C. at 61,403; to revoking blanket marketing certificates as a penalty for index manipulation, 103 F.E.R.C. at 62,295; to promulgating the Code of Conduct expressly forbidding false reporting to the indices and wash trades, 68 Fed. Reg. at 66,323. Along the way, FERC explained why it had statutory authority to enact those policies, and it rejected a challenge that it lacked authority to regulate index manipulation under Section 5(a). The agency wrote that "many gas * * * jurisdictional transactions are based on the published indices." 103 F.E.R.C. at 61,286. And it later concluded that "the prohibited practices are unjust and unreasonable, and that their explicit prohibition is necessary to ensure that market-based sales of gas will be adequately protected from

manipulation and, therefore, will be just and reasonable." 107 F.E.R.C. at 61,690.

FERC's conclusion that it had authority to regulate was quite correct. As the United States put it: "Because manipulation of the indices * * * directly affected the wholesale price of natural gas," it qualifies as "a 'practice * * * affecting' the rates charged by natural gas companies in jurisdictional sales within the meaning of" Section 5(a). U.S. Cert. Br. 12-13. FERC's interpretation of the scope of its authority follows from Section 5(a)'s plain text—but if there were any room for doubt, the Commission's determination would warrant deference. *See City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1871-73 (2013).

In short, FERC's jurisdiction over index manipulation "is demonstrated not only by FERC's actual exercise thereof in relation to these practices," but also "by the fact that the Court would have little trouble rejecting a challenge to FERC's jurisdiction to prohibit jurisdictional sellers from engaging in false price reporting, wash trades, and other collusive or manipulative conduct that affected the price mechanism by which jurisdictional rates are set." Pet. App. 111a. And FERC's exclusive jurisdiction to prohibit those practices preempts state regulation of the same conduct: "It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Mississippi Power*, 487 U.S. at 377 (Scalia, J., concurring in the judgment). Because "FERC's exclusive jurisdiction applies not only to rates, but also to [matters] that affect wholesale rates," *id.* at 371 (majority op.), the NGA occupies the field.

B. Respondents' State-Law Actions Fall Within The Preempted Field.

FERC's exclusive authority to regulate index-manipulation practices means that Respondents' state-law claims—which seek to impose liability for those very same practices—are preempted.

1. To determine whether a state law regulates within the field preempted by the NGA, this Court examines whether it is "directed at * * * things over which FERC has comprehensive authority." *Schneidewind*, 485 U.S. at 308. "The test * * * is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Id.* at 310 n.13 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)). No matter a state law's nominal subject, it fails this test if it "amounts to a regulation" of issues within federal control. *Schneidewind*, 485 U.S. at 307; *see also Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1268 (2012) (finding a state-law claim preempted because it was "directed to the same subject" as a federal statute that had long been interpreted to preempt the field).

2. In a series of NGA and FPA cases, this Court has underscored that the preemption analysis does not change when a state purports to regulate matters within state authority: If the law amounts to regulation in the federal field, it is preempted.

The leading case is *Schneidewind*. There, the Court struck down a Michigan law that required natural gas companies transporting gas in Michigan to obtain state approval before issuing securities. The Court recognized that Michigan had a legitimate interest in " 'securities regulation' in the traditional sense of the term," but that did not save the law from preemption

because it had the "effect" of "regulat[ing] matters that Congress intended FERC to regulate." 485 U.S. at 308-309 & n.11. It wrote that "[b]y keeping a natural gas company from raising its equity levels above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.'" *Id.* at 308. "[B]ut the NGA ha[d] equipped FERC * * * to address the precise concerns [the Michigan law] purports to manage"—including the "authority to regulate and fix practices affecting rates," which "allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments." *Id.* at 309. The Court concluded that the Michigan law "amount[ed] to a regulation of" those jurisdictional matters and so impermissibly "intrud[ed] on a field of regulation that federal legislation has occupied." *Id.* at 307, 309 & n.12.

Northern Natural provides another example. In that case, Kansas contended that it could require an interstate pipeline to purchase gas proportionately from producers within the state because Kansas sought to regulate only "the 'production or gathering' of natural gas, which is exempted from" federal regulation by Section 1(b). 372 U.S. at 89. The state further contended that its regulation was "essential for the conservation of natural gas, and that conservation is traditionally a function of state power." *Id.* at 93.

Despite these invocations of traditional state authority, the Court had no trouble concluding that the state law was preempted because the Kansas order was "aimed directly at" jurisdictional sellers and jurisdictional transactions. *Id.* at 94. Even though the nominal subject of the law implicated matters within state authority, the Supremacy Clause forbade "the particular means chosen by" Kansas to regulate that

subject. *Id.* at 93. "[A]ny readjustment of purchasing patterns which [the law] might require," the Court reasoned, "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers." *Id.* at 92. Given the potential for "interference * * * with the prices of natural gas wholesales," *id.* at 93, the Court invalidated the state law "in order to assure the effectuation of the comprehensive federal regulation ordained by Congress." *Id.* at 92.

3. Nor does the NGA lose its preemptive force simply because a practice falling within FERC's jurisdiction also affects matters otherwise subject to state control. In *Mississippi Power*, for example, four utilities entered into an agreement allocating the costs of constructing and operating a nuclear power plant. 487 U.S. at 361. Because the utilities engaged in both wholesale purchases and retail sales, their power allocation agreement simultaneously affected rates for both types of transactions. *Id.* at 357.

But that simultaneous effect did not diminish the scope of FERC's jurisdiction. Instead, the Court concluded that the allocation agreement qualified as a contract "affecting * * * wholesale rates." *Id.* at 360 n.6. That triggered FERC's authority over the agreement. *Id.* at 371. And the Court made clear that FERC's authority was exclusive: It held that Mississippi could not "exercise its undoubted jurisdiction over retail sales" to examine the prudence of the allocation agreement for purposes of setting retail rates. *Id.* at 372. Because "[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction * * * to insure that agreements affecting wholesale rates are reasonable," Mississippi could not

review the agreement even as it related to retail sales without "traversing matters squarely within FERC's jurisdiction." *Id.* at 374, 376.

Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), makes the same point. The Court there held that FERC had authority to require pipelines to curtail retail gas deliveries, along with wholesale gas deliveries, in times of gas shortage. *Id.* at 623, 642. In this situation, the Court reasoned, it would be impossible to regulate retail and wholesale transactions separately because curtailment of one type of sale affects the volume of gas that remains to be delivered in the other type of sale. *See id.* at 632. Thus, states could not separately regulate curtailment by invoking their authority over retail sales; in this area, like the others the NGA commits to federal control, "the desirability of uniform federal regulation is abundantly clear." *Id.* at 633-635.

4. a. Under a straightforward application of these precedents, Respondents' claims are preempted. Respondents' suits seek to impose state-law liability on jurisdictional sellers for alleged false price reporting to index publishers and for alleged wash sales. *See* Pet. App. 15a; *e.g.* J.A. 304-305. Those are the very same index-manipulation practices that FERC has regulated under Section 5(a) because they directly affect wholesale rates. *See* Code of Conduct, 68 Fed. Reg. at 66,323. Respondents' claims accordingly are "directed at" matters within FERC's exclusive jurisdiction. *Schneidewind*, 485 U.S. at 308.

And there is no doubt that Respondents' lawsuits will "amount[] to a regulation" of practices within the federal field. *Id.* at 307. As this Court has recognized, "[t]he obligation to pay compensation can be, indeed is

designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). The Court thus has subjected regulation-by-lawsuit to the same preemption analysis as any other state regulatory action. *See, e.g., Kurns*, 132 S. Ct. at 1265; *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 325 (2008). Here, Respondents' suits are not just "aimed directly at" index-manipulation practices the NGA commits to federal control, *Northern Natural*, 372 U.S. at 94; they also would "exert[]" regulation over those index-manipulation practices "through an award of damages," *Garmon*, 359 U.S. at 247. The Supremacy Clause forbids this result.

b. The fact that Respondents happened to suffer their alleged injuries in retail sales does not save their claims. Their suits are "unmistakably and unambiguously aimed" at the practice of index manipulation. *Northern Natural*, 372 U.S. at 92; *see* Pet. App. 53a (observing that Respondents "predicated their antitrust claims on the [alleged] manipulation of the price indices"). That their suits claim damage in retail transactions is therefore irrelevant. Just as Michigan could not invoke its authority over securities to escape preemption in *Schneidewind*, and just as Kansas could not invoke its authority over production and conservation to justify its regulation in *Northern Natural*, Respondents cannot invoke state authority over retail purchases to justify their regulation of index-manipulation practices by jurisdictional sellers that directly affect jurisdictional rates. Section 5(a) places such practices squarely within federal power, preempting *any* purchaser—whether retail or wholesale—from using state law to impose liability for those same practices.

c. It does not matter that index-manipulation practices simultaneously affect not just wholesale rates but also retail rates priced with reference to the same indices. *Mississippi Power* and *Louisiana Power* teach that this kind of simultaneous effect on non-jurisdictional matters does not eliminate the Commission's jurisdiction or alter the NGA's preemptive scope. *See Mississippi Power*, 487 U.S. at 372, 376; *Louisiana Power*, 406 U.S. at 632-635.

As a practical matter, index-reporting practices cannot be divided into separate wholesale and retail spheres. The same indices are used by both wholesale and retail purchasers to set the price terms in their contracts, so any practices affecting an index price will necessarily affect the rates paid for gas in both types of transactions. In this sense, the practices at issue here are analogous to the power-allocation agreement in *Mississippi Power*. That agreement required a utility to incur costs associated with a particular power plant, which simultaneously increased the utility's wholesale and retail rates. Yet even though the allocation agreement necessarily impacted the price for electricity at retail, this Court concluded that FERC had exclusive authority to regulate the agreement because it was a contract affecting wholesale rates. *Mississippi Power*, 487 U.S. at 372, 376. And FERC's jurisdiction over the agreement ousted the state from further regulation notwithstanding that the agreement also affected retail rates. *Id.* In short, when a contract—or practice—directly affects both markets, FERC has jurisdiction, and that jurisdiction is exclusive due to NGA field preemption. So it is here.

Louisiana Power adds the insight that uniform federal regulation is essential when a single act simultaneously affects retail and wholesale

transactions, because in that circumstance states have no ability to confine their regulation to the retail side of the line. When pipeline capacity is curtailed in times of gas shortage, for example, state law purporting to regulate only retail deliveries of gas will necessarily affect the amount of gas that remains to be delivered at wholesale and, therefore, is preempted. *Louisiana Power*, 406 U.S. at 632-633; *see also Schneidewind*, 485 U.S. at 310. So too here, state law cannot be used to regulate jurisdictional sellers' index-reporting practices because such state regulation necessarily would also affect index-priced jurisdictional rates.

In short, because Respondents' claims "necessarily deal with matters which directly affect the ability of [FERC] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act," they "invalidly invade the federal agency's exclusive domain." *Northern Natural*, 372 U.S. at 91-92.

C. The Imminent Possibility Of Collision Between State And Federal Regulation Further Demonstrates That Respondents' Claims Are Preempted.

1. Because the NGA grants FERC exclusive jurisdiction over wholesale rates and any practices by jurisdictional sellers directly affecting those rates, state law is preempted even absent a direct conflict with federal law. *See Arizona*, 132 S. Ct. at 2502 ("Where Congress occupies an entire field * * * even complementary state regulation is impermissible."). But "the imminent possibility of collision between" state and federal regulation of index-related practices

"further demonstrates the NGA's complete occupation of the field that [Respondents' suits] seek[] to regulate." *Schneidewind*, 485 U.S. at 310.

In its Policy Statement setting forth standards of conduct for index reporting, FERC emphasized that it was "provid[ing] a measure of regulatory certainty to the process of reporting transaction data." 104 F.E.R.C. at 61,404. To that end, FERC carefully crafted index-reporting rules and offered safe-harbor protection to jurisdictional sellers reporting sales to the indices in accordance with those rules. The Commission continued to fine-tune its regulatory approach in the Code of Conduct when it prohibited acts "intended to * * * manipulate market prices" that "are without a legitimate business purpose." 68 Fed. Reg. at 66,327. The Commission noted that the "legitimate business purpose" standard was necessary to "ensure that * * * sellers acting in a pro-competitive manner will be able to show that their actions were not designed to distort prices or otherwise manipulate the market," and it emphasized that it would "examine all relevant facts and circumstances surrounding [challenged] activity to evaluate whether there is a legitimate business purpose attributable to the behavior." *Id.* at 66,328. FERC explained that "th[e] code is clearly defined so that it does not create uncertainty, disrupt competitive commodity markets, or simply prove ineffective." *Id.* at 66,324. And it stressed that it would regularly evaluate "the effectiveness and consequences of these regulations" given the "dynamic" nature of the industry. *Id.*

Respondents' attempt to regulate the exact same conduct under state law threatens to undermine the

federal scheme.[4] Even if a particular practice would qualify for safe-harbor protection under FERC's Policy Statement or would fall within FERC's definition of a "legitimate business purpose," lay juries might nevertheless impose liability under state law. As the Tennessee Supreme Court has recognized in reviewing claims similar to those Respondents raise, there is no Platonic ideal of a competitive market that all antitrust laws strive to protect; on the contrary, "there is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene." *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010) (holding that the NGA preempted state-law suit by retail purchasers challenging index manipulation). What FERC might consider a legitimate business transaction, a state-court jury might deem a manipulative wash sale. What FERC might view as a legitimate way of reporting transactions to the trade press, a state-court jury might consider deceptive. *See id.* Conflicting judgments on these matters would eviscerate the

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[4] It is no answer to observe that FERC had not yet formally promulgated the Code of Conduct during the time period at issue in Respondents' suits. As FERC explained, its "original grant of certificate authority" to Petitioners and other jurisdictional sellers "implicitly prohibited acts which would manipulate the competitive market for natural gas." 107 F.E.R.C. at 61,690. FERC accordingly entered into consent agreements with many jurisdictional sellers, including some Petitioners here, to resolve allegations of misconduct during the time period targeted by Respondents' suits. *See, e.g., Order Approving Stipulation and Consent Agreement*, 110 F.E.R.C. ¶ 61,305 (Mar. 23, 2005). In any event, it is the *existence* of FERC's jurisdiction, and not just its exercise, that creates the possibility of collision with state regulation of the same conduct. *See Mississippi Power*, 487 U.S. at 375.

"regulatory certainty" FERC has deemed essential to the effective operation of interstate gas markets. 104 F.E.R.C at 61,404. Moreover, the threat of liability would force jurisdictional sellers to alter their behavior to conform to the law in the most restrictive state, rather than the rules imposed by FERC. This " 'prospect of interference with the federal regulatory power' " confirms that Respondents' suits are preempted. *Schneidewind*, 485 U.S. at 310 (quoting *Northern Natural*, 372 U.S. at 91-92).

Moreover, the potential for conflict extends beyond the conduct penalized to the remedy imposed. Respondents seek remedies under state laws that, in marked contrast to federal law, require antitrust defendants in certain circumstances to disgorge the *full price* paid for gas—not just the amount of the alleged overcharge. *See* Kan. Stat. Ann. § 50-115 (2011) (now repealed); Wis. Stat. Ann. § 133.14; Colo. Rev. Stat. § 6-4-121. Indeed, many Respondents strategically declined to plead federal antitrust actions so that they could pursue these extravagant state-law sanctions. Pet. App. 40a-41a; *see* U.S. Cert. Br. 17 (explaining that the NGA does not displace federal antitrust laws). Thus, even if all state antitrust laws shared the same objectives as their federal counterparts, "[p]ermitting the [s]tate[s] to impose [their] own penalties would * * * conflict with the careful framework Congress adopted." *Arizona*, 132 S. Ct. at 2502.

2. The risk of collision extends not only to index-manipulation practices, but to any other practice (or rule, regulation, or contract) that directly and simultaneously affects retail and wholesale prices for gas. After all, gas companies frequently engage in conduct that affects the rates in *all* transactions, not just jurisdictional sales—from accounting practices

allocating costs and addressing depreciation to investment decisions such as whether to enter into a bona-fide financial hedge. FERC regulates such practices given their direct effect on wholesale rates. *See, e.g., In re Entergy Servs., Inc.*, 137 F.E.R.C. ¶ 61,029, 2011 WL 4703181, at *13 (Oct. 7, 2011) (accounting practices); Code of Conduct, 68 Fed. Reg. at 66,328 (hedges). If states may compete with FERC to regulate these practices by pointing to their simultaneous effects on retail rates, "the inevitable result would be varied regulatory programs of state courts and agencies * * * applying a variety of" different and possibly irreconcilable state laws. *Louisiana Power*, 406 U.S. at 633.

The NGA was enacted to prevent this regulatory chaos. Shared state and federal jurisdiction over the same conduct is anathema to it. States therefore lack authority to regulate practices that directly affect jurisdictional rates, even if retail rates also are affected: "Not the federal but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field." *Northern Natural*, 372 U.S. at 93. To guard against the "imminent possibility of collision" when companies face competing demands from multiple regulators, and to vindicate "the Natural Gas Act's objective of uniformity," Respondents' claims are preempted. *Id.* at 92, 98.

II. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS IS FUNDAMENTALLY FLAWED.

Against all this, the Ninth Circuit permitted Respondents' suits to proceed on the theory that that result implements Section 1(b)'s division between jurisdictional sales regulated by the federal government and non-jurisdictional sales regulated by

the states. Pet. App. 29a. A contrary interpretation, the Ninth Circuit believed, would have no " 'conceptual core' delineating transactions falling within FERC's jurisdiction and transactions outside of FERC's jurisdiction." *Id.* at 32a. To prevent this result, the court held that state claims can permissibly target index manipulation "associated with" non-jurisdictional sales, even if the plaintiff's claim amounts to regulation of matters subject to FERC's authority. Pet. App. 31a.

That preemption analysis suffers from a fundamental flaw: This Court has already considered the limits of FERC's Section 5(a) authority and drawn a different line than the Ninth Circuit did here. Under this Court's precedents, FERC may regulate practices that *directly affect* jurisdictional rates, but may not regulate practices that only indirectly do so. Moreover, FERC is barred from using its Section 5(a) authority to regulate rates in retail transactions; Section 1(b) specifically excludes this rate-setting authority from FERC's powers. These limits on federal power are well established and clearly have a "conceptual core," even though the Ninth Circuit did not perceive it. They properly preserve state authority over matters of local concern. But they do not save Respondents' claims from preemption: The alleged index manipulation directly affected jurisdictional rates, and federal regulation of that practice is not prohibited retail rate-setting.

A. The Ninth Circuit's Analysis Ignores This Court's Caselaw Delineating The Scope Of FERC's Jurisdiction.

1. In its attempt to draw a line between the state and federal fields, the Ninth Circuit focused on the type of *transaction* in which Respondents bought gas and ignored the alleged *practices* giving rise to liability. Pet. App. 28a. That was error. The Ninth Circuit ignored that this Court has already drawn a different line between state and federal power in this area: The NGA grants FERC exclusive authority over practices and contracts that directly affect wholesale rates, but does not displace state regulation over practices and contracts with only attenuated effects.

Schneidewind explicitly adopted this test. The Court acknowledged there that "[o]f course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted." 485 U.S. at 308. But that did not mean the Michigan statute regulating jurisdictional sellers' issuance of securities could escape preemption. The statute was preempted, the Court said, because its "effect" on wholesale rates "is not 'indirect.'" *Id.*; *see also, e.g.*, *Transcon*, 474 U.S. at 422 (finding state regulation preempted when it affected jurisdictional seller's purchasing patterns and so "directly undermine[d] Congress' determination" to let market forces dictate those patterns).

The Court reiterated the direct-effects test in *Northwest Central*, which the Ninth Circuit erroneously thought supported its "narrow[]" construction of FERC's jurisdiction. Pet. App. 29a-

30a.[5] In *Northwest Central*, a Kansas regulation provided that producers would forfeit their rights to extract gas from a given field if they delayed production for too long. 489 U.S. at 497. The regulation was a conservation measure meant to prevent imbalance in the field between those wells that were actively producing and those that were not, protecting all of the well owners' production rights in the long run. *Id.* at 499-504. Although Section 1(b) of the NGA expressly preserves state control over gas production, an interstate pipeline contended the regulation was preempted because it "might have some effect on interstate rates" by creating incentives for the pipeline to alter its cost structures. *Id.* at 512-513.

This Court rejected the pipeline's argument, ruling that any effect was too remote to strip the state of its authority to regulate non-jurisdictional matters. *See*

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[5] The Ninth Circuit also relied on two D.C. Circuit cases to support its narrow reading, Pet. App. 30a-34a, but they, too, simply apply the direct-effects test. In *American Gas Association* v. *FERC*, 912 F.2d 1496, 1506 (D.C. Cir. 1990), the court held that FERC could not rely on Section 5 to regulate certain terms in non-jurisdictional contracts because those contracts affected jurisdictional rates only "indirectly." Yet the court affirmed that FERC has authority under Section 5(a) to regulate matters that "directly govern[] the rate in a jurisdictional sale[.]" *Id.* And in *California Independent System Operator Corp.* v. *FERC*, 372 F.3d 395 (D.C. Cir. 2004), the D.C. Circuit again affirmed that FERC's Section 5(a) authority reaches "those methods or ways of doing things on the part of the utility that directly affect the rate," but does not extend to "all those remote things beyond the rate structure that might in some sense indirectly or ultimately" affect wholesale rates, such as the composition of an independent system operator's board of directors. *Id.* at 403. These precedents confirm FERC's exclusive jurisdiction here because Petitioners' alleged index manipulation directly affected jurisdictional rates.

id. at 514. As the Court explained, "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers." *Id.* But "[t]o find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates *might* be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production." *Id.* (emphasis added).

In relying on this direct-effects test, *Northwest Central* rejected a simplistic divide between jurisdictional and non-jurisdictional matters—the very divide the Ninth Circuit adopted here. As the Court explained, "[t]he congressionally designed interplay between state and federal regulation under the NGA does not * * * permit States to attempt to regulate pipelines[] * * * in the mere guise of regulating production." *Id.* at 518. Thus, no matter whether a "rule is labeled" as a regulation of non-jurisdictional matters, it may be preempted if its "purpose * * * is to influence" jurisdictional sellers and activities. *Id.* *Northwest Central* thus confirms *Schneidewind*'s direct-effects test.[6]

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[6] Notably, this Court has relied on the distinction between direct and indirect effects to assess the preemptive scope of a wide variety of statutes. For example, in interpreting the Federal Aviation Administration Authorization Act of 1994, which preempts state laws "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property," 49 U.S.C. § 14501(c)(1), the Court has permitted state regulation that has " 'only a tenuous, remote, or peripheral' " impact on motor carriers' prices, routes, and services. *Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769, 1778 (2013) (quoting *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008)). To be preempted, state law must have a " '*significant* impact' " on the matters subject to federal control. *Rowe*, 552 U.S. at 375 (citation

2. The Ninth Circuit thought it necessary to "narrow[]" FERC's Section 5 authority, Pet. App. 29a, because it fretted that FERC might attempt to regulate retail or other non-jurisdictional sales as a " 'practice' affecting jurisdictional rates." *Id.* at 32a. That concern was misplaced. Both the direct-effects test and Section 1(b) itself guard against any hypothetical attempt by FERC to use Section 5(a) to "nullify[] the jurisdictional provisions of Section 1(b)." Pet. App. 31a.

First, any attempt would founder on the requirement of a direct effect. To be sure, some non-jurisdictional sales—such as a wellhead sale by a producer to an interstate pipeline—may *indirectly* influence the price a jurisdictional seller charges in wholesale transactions by altering the seller's costs. But as the Court recognized in *Northwest Central*, this kind of "effect on [jurisdictional sellers'] cost structures" qualifies as indirect. 489 U.S. at 512. The direct-effects test accordingly prevents the kind of overreaching the Ninth Circuit feared.

Moreover, Section 1(b) itself provides a backstop against direct federal regulation of retail sales. It provides that FERC's rate-setting authority extends to "the sale in interstate commerce of natural gas for resale," but not "to any other * * * sale of natural gas." 15 U.S.C. § 717(b). That prohibition makes clear that it is *states* that have authority to set retail rates.

In any event, there is no such FERC overreach here. By promulgating the Code of Conduct, FERC was not

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omitted). The Court has applied the same test under the Airline Deregulation Act of 1978, interpreting it to preempt only state laws that have a "significant effect upon fares." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992).

dictating prices in retail transactions; rather, it was prohibiting conduct that directly affects prices in wholesale transactions. Unlike in *Northwest Central*, it cannot be said that FERC's regulation of index-manipulation practices "would be largely to nullify that part of NGA § 1(b) that leaves to the States control over" retail rates. 489 U.S. at 514. The Ninth Circuit was wrong to use that justification to adopt a cramped interpretation of FERC's Section 5(a) authority.

Indeed, the Ninth Circuit's approach to preemption creates the very problems the court purported to solve. The Ninth Circuit insisted that courts must respect Section 1(b)'s jurisdictional limitations. But the court of appeals' preemption analysis permits states to end-run that provision's delineation of matters subject to *federal* control. If any state law "associated with" a non-jurisdictional transaction is permissible, Pet. App. 31a, then states will have free rein to regulate jurisdictional practices "in the mere guise of regulating" retail sales. *Northwest Central*, 489 U.S. at 518. Here, for example, if Petitioners must conform their index-reporting practices to state law, FERC will lack exclusive authority over practices that directly impact wholesale rates. And that will be true even though Section 1(b) expressly grants the Commission power over "the sale in interstate commerce of natural gas for resale" and the "natural gas companies engaged in" such sales, 15 U.S.C. § 717(b), and even though Section 5(a) was intended to give FERC effective tools to ensure that wholesale rates are just and reasonable. That result turns the Supremacy Clause inside out.

3. Recognizing that the Ninth Circuit's approach to preemption cannot be squared with this Court's precedents, the Learjet Respondents belatedly have argued that their suits are not preempted because

Petitioners' alleged index manipulation supposedly had only an *indirect* effect on wholesale rates. Learjet Br. in Opp. 19-20. That claim is both waived and meritless.

a. The Learjet Respondents waived their indirect-effects argument by failing to make it below. Before the Ninth Circuit, all parties agreed that Petitioners' alleged index-manipulation practices directly affected jurisdictional rates. In the words of the Learjet Respondents, index prices were "used to set the price in jurisdictional transactions like sales for resales." Learjet C.A. Opening Br. 12. And Respondents' expert candidly agreed that alleged index manipulation had a "direct impact" on transactions priced with reference to the indices. J.A. 594. As that expert averred, "the prices that were the subject of the manipulation *are* the prices of natural gas in this country." J.A. 593 (emphasis added).[7]

Given the parties' agreement that index manipulation would directly affect jurisdictional rates, it is not surprising that the Ninth Circuit failed to pass upon Respondents' newly minted claim that the effect was attenuated. In their brief in opposition, the Learjet Respondents maintained that "the Ninth Circuit decided this appeal on the premise that

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[7] Ignoring this record evidence, the Learjet Respondents now claim that they challenged the District Court's finding of a direct effect on jurisdictional rates. Learjet Br. in Opp. 19-20 n.3. But they cite nothing for this proposition because there is nothing in the Ninth Circuit record to support it. Notably, the Wisconsin Respondents did not join this effort to rewrite history. They do not dispute that index manipulation directly affected wholesale rates; they instead contend, wrongly, that this direct effect is "irrelevant, because the test is whether the sales in question are wholesale or retail." Wisconsin Br. in Opp. 19 n. 20.

petitioners' reporting practices had at most an indirect effect on wholesale rates." Learjet Br. in Opp. 20 (emphasis omitted). But that supposed premise appears nowhere in the court of appeals' decision. Under the Ninth Circuit's approach to preemption, it is wholly irrelevant whether effects are direct or indirect; the only thing that matters is whether plaintiffs purchased their gas at retail rather than wholesale. Because Respondents did not "seek consideration" of an indirect-effects argument below and the Ninth Circuit "did not address" it, the claim is waived. *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004).

Indeed, instead of pressing an indirect-effects theory below, the Learjet Respondents expressly urged the court of appeals to adopt its flawed transaction-based approach to preemption. Respondents asserted that "FERC's jurisdiction end[s]—and the States' beg[ins]" based on "the nature of the transaction at issue." Learjet C.A. Opening Br. 35. The District Court erred, they argued, by declining to apply a "transaction-based analysis" focused solely on whether the plaintiffs' purchases were at retail or wholesale. *Id.* at 39. While Respondents may regret those arguments, they cannot escape the consequences of them: "When issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. Even if Respondents had preserved an indirect-effects argument, it is meritless. The record amply demonstrates that the price terms of jurisdictional transactions were routinely pegged to the indices, so any alleged manipulation inflating index prices directly affected wholesale rates.

The record is replete with evidence that jurisdictional sellers entered into contracts for wholesale transactions that adopted the index rate as the sales price for gas. For instance, Petitioner CMS Marketing Services sold over 14.5 million MMBtu of wholesale natural gas at index prices between 2000 and 2002. J.A. 632. Petitioner Duke Energy Trading and Marketing sold 55,000 MMBtu of index-priced wholesale natural gas per day in September 2001. J.A. 640-641. And Petitioners AEP Energy Services, Coral Energy Resources, e-prime, and RRI Energy Services collectively sold 1.9 billion MMBtu of wholesale natural gas at index prices between 2000 and 2002 in 5,954 separate transactions. J.A. 645. Given all this, it is not surprising that FERC expressly found that "many Commission-jurisdictional transactions * * * are based on the indices." J.A. 150.

Because the index price functioned as the rate of wholesale gas in these contracts, any index manipulation directly affected that rate. As FERC put it, any "inaccuracy [resulting from index manipulation] in the published index price fed back into the markets" by altering the price term in jurisdictional index-linked contracts. J.A. 148; *see also* U.S. Cert. Br. 16. For example, if wash sales and false price reporting inflated a particular index price by $1.00 per MMBtu, that $1.00 increase would be reflected in each and every wholesale contract priced with reference to that index. It is difficult to conceive of an effect more direct than that.

That leaves the Learjet Respondents arguing that "it was mostly petitioners themselves who happened to use inflated indexes as pricing points in wholesale transactions." Learjet Br. in Opp. 20. But Respondents do not explain why this would make the

effect between inflated indices and wholesale rates indirect. The *sine qua non* of market pricing is that prices are set by market participants, such as Petitioners and their contracting partners, rather than FERC. And that is precisely why FERC regulated Petitioners' index-reporting practices: If the index-linked rates for natural gas were to be just and reasonable, as the NGA demands, 15 U.S.C. § 717c, "the indices must be robust and accurate and have the confidence of market participants." 104 F.E.R.C. at 61,404. Respondents' last-ditch effort to cast this as an indirect-effects case fails.

B. The Ninth Circuit's Remaining Justifications For Adopting Its Preemption Approach Are Flawed.

The Ninth Circuit cited a grab bag of other interpretive tools to support its preemption analysis, including the presumption against preemption, the superfluity canon, the jurisdictional boundaries of the Code of Conduct, and the supposed congruence between state and federal law. Its reliance on each was misplaced.

1. The Ninth Circuit erroneously believed a "presumption against preemption" applied in this case and carried "particular force in light of Congress's deliberate efforts to preserve traditional areas of state regulation of the natural gas industry." Pet. App. 24a. At the outset, it is unclear whether the presumption should apply at all in a case like this one, which involves "[s]tate regulat[ion] in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (holding the presumption "is not triggered" in this circumstance). But in any event, even if the

presumption in favor of the States' "historic police powers," *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009), would have applied at some time in the past, it has long been overcome. It is now "well settled" that through the NGA "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 305. The Ninth Circuit erred by disregarding this Court's repeated holdings that the NGA reflects that clear and manifest intent. *See Kurns*, 132 S. Ct. at 1266-70 (ignoring plaintiff's argument that a presumption against preemption should apply and explaining that the Court was not "address[ing] the LIA's preemptive effect on a clean slate" because it had previously ruled that the LIA occupied the field).

2. The Ninth Circuit also erred in invoking the superfluity canon. Pet. App. 37a. The court of appeals pointed to the 2005 EPAct, which grants FERC authority to regulate manipulative conduct by "any entity" in connection with jurisdictional sales. *Id.* at 37a-38a. According to the Ninth Circuit, the EPAct's existence must mean that FERC lacked authority to regulate manipulative conduct, such as index manipulation, before the EPAct was enacted. It concluded: "Congress enacted the relevant provision of the EPA *because* FERC did not already have regulatory authority over the anticompetitive conduct at issue." *Id.*

But the Ninth Circuit's premise was simply wrong, and so was its conclusion. Before the EPAct was enacted, FERC had authority to regulate *jurisdictional sellers'* market manipulation that directly affected jurisdictional rates. *See* 68 Fed. Reg. at 66,326; U.S. Cert. Br. 4-5. The EPAct expanded FERC's jurisdiction

to cover *any* entity's market manipulation in connection with jurisdictional rates. 15 U.S.C. § 717c-1; *see also* 71 Fed. Reg. at 4247-48. For example, prior to the EPAct, FERC would not have had authority to regulate index manipulation by a gas producer because such a producer is not a jurisdictional seller. *See* 15 U.S.C. §§ 3301(21), 3431. After the EPAct, FERC could regulate index manipulation by such an entity.

Thus, the EPAct did not change what conduct is within FERC's jurisdiction, as the Ninth Circuit believed. Instead, it changed *whose* conduct is within FERC's jurisdiction. And that change is wholly irrelevant to this case because Petitioners are all jurisdictional sellers who were subject to FERC's regulation of their index-reporting practices long before the EPAct was enacted. The canon against superfluity has no application here.

3. In the same vein, the Ninth Circuit misunderstood FERC's interpretation of its own jurisdiction. The Ninth Circuit insisted that "a close reading of the Code [of Conduct] reveals that FERC limited the application of the Code to sales within its jurisdiction," leading the court to conclude that "the Code of Conduct * * * does not support [Petitioners'] argument that FERC had jurisdiction over the anticompetitive behavior related to nonjurisdictional sales." Pet. App. 38a (emphasis omitted).

The Ninth Circuit confused jurisdictional *sales* with jurisdictional *sellers*. To be sure, FERC emphasized that the Code of Conduct only governed the index-reporting practices of jurisdictional sellers like Petitioners because Section 5(a) grants the agency no authority to regulate the practices of non-jurisdictional sellers. 68 Fed. Reg. at 66,325-26. As FERC

explained, "[t]he fact that the Commission does not have authority to regulate all sellers in the natural gas market cannot prevent the Commission from explicitly imposing code of conduct rules on all sellers within its jurisdiction which the Commission determined is necessary to prevent the manipulation of prices." 107 F.E.R.C. at 61,690. But the Code of Conduct did not, as the Ninth Circuit seemed to believe, exclude jurisdictional sellers from federal regulation any time the indices happened to be used to set the price in retail contracts.

Indeed, it is literally impossible to parcel out index-reporting practices into separate retail and wholesale spheres, because the same indices are used to set prices in both types of contracts. Thus in this case there is no category of "anticompetitive behavior associated with nonjurisdictional sales" alone. Pet. App. 39a. Any index-reporting practices are simultaneously "associated with" both jurisdictional and non-jurisdictional sales.

4. Finally, the Ninth Circuit's belief that state antitrust law complements federal law in this context, Pet. App. 27a, is both wrong and irrelevant. It is wrong because, as previously discussed, *supra* at 32, "conflict is imminent whenever two separate remedies are brought to bear on the same activity." *Arizona*, 132 S. Ct. at 2503 (internal quotation marks omitted). And it is irrelevant because "[w]here Congress occupies an entire field," as it has through the NGA, "even complementary state regulation is impermissible." *Id.* at 2502. The Ninth Circuit "ignore[d] the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself." *Id.* The NGA grants FERC exclusive authority over jurisdictional sellers' index-

reporting practices, thereby "foreclose[ing] any state regulation in the area, even if it is parallel to federal standards." *Id.* That should have been the end of the Ninth Circuit's inquiry into the matter—and the end of Respondents' suits.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's judgment should be reversed.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

September 2014

ADDENDUM

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1. The Supremacy Clause, U.S. Const. art. vi, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

2. Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

3. Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a) provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the juris-

diction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

4. Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c provides:

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

5. 15 U.S.C. § 717c-1 provides:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section

78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

6. Kan. Stat. Ann. § 50-115 (2011) provided:

Recovery of damages by person injured by combination; exception. Except as provided in K.S.A. 12-205, and amendments thereto, any person injured or damaged by any such arrangement, contract, agreement, trust or combination, described in K.S.A. 50-112 and 50-113, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money borrowed.

7. Wis. Stat. Ann. § 133.14 provides:

All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by s. 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

8. Colo. Rev. Stat. § 6-4-121 provides:

> All contracts or agreements made by any person while a member of any combination, conspiracy, trust, or pool prohibited under this article which are founded upon, or are the result of, or grow out of, or are connected with any violation of this article, either directly or indirectly, shall be void, and no recovery thereon or benefit therefrom shall be had by or for any such person. Any payments made upon, under, or pursuant to such contract or agreement to or for the benefit of such person may be recovered in an action by the party making the payment or his heirs, personal representatives, or assigns.

RESPONDENT'S BRIEF

No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS LEARJET, INC., *et al.*; HEARTLAND REGIONAL MEDICAL CENTER, *et al.*; BRECKENRIDGE BREWERY OF COLORADO, LLC, *et al.*; REORGANIZED FLI, INC.; and SINCLAIR OIL CORP.

Jeffrey L. Fisher
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jennifer Gille Bacon
Counsel of Record
William E. Quirk
Gregory M. Bentz
Anthony Bonuchi
Andrew J. Ennis
POLSINELLI PC
900 W. 48th Place
Kansas City, MO 64112
(816) 753-1000
jbacon@polsinelli.com

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

ADDITIONAL COUNSEL

Donald D. Barry
BARRY LAW OFFICES, LLC
DONALD D. BARRY, CHARTERED
5340 S.W. 17th Street
P.O. Box 4816
Topeka, KS 66604
(785) 273-3151
Counsel for Respondents Learjet, Inc., et al., Heartland Regional Medical Center, et al., Breckenridge Brewery of Colorado, LLC, et al., Arandell Corp., et al., Wisconsin System, Inc., et al., and Reorganized FLI, Inc.

Eric I. Unrein
FRIEDEN, UNREIN & FORBES, LLP
555 S. Kansas Avenue
Suite 303
Topeka, KS 66603
(785) 354-1100
Counsel for Respondents Learjet, Inc., et al., and Reorganized FLI, Inc.

Isaac L. Diel
SHARP MCQUEEN, P.A.
6900 College Boulevard
Suite 285
Overland Park, KS 66207
(913) 661-9931
Counsel for Respondent Reorganized FLI, Inc.

Gary D. McCallister
GARY D. MCALLISTER & ASSOCIATES, LLC
120 N. LaSalle Street
Suite 2800
Chicago, IL 60602
(312) 345-0611
Counsel for Respondents Learjet, Inc., et al. and Reorganized FLI, Inc.

Thomas J.H. Brill
LAW OFFICES OF THOMAS H. BRILL
8012 State Line Road
Suite 102
Leawood, KS 66208-3712
(913) 677-2004
Counsel for Respondent Reorganized FLI, Inc.

Melvin Goldstein
Matthew A. Corcoran
GOLDSTEIN & ASSOCIATES, PC
1757 P Street, NW
Washington, DC 20036
(202) 872-8740
Counsel for Respondent Sinclair Oil Corporation

Philip M. Ballif
DURHAM JONES & PINEGAR
111 East Broadway
Suite 900
Salt Lake City, UT 84111
(801) 415-3000
Counsel for Respondent Sinclair Oil Corporation

QUESTION PRESENTED

Whether the Natural Gas Act – as it existed before 2005 – preempts state antitrust claims arising from a conspiracy to inflate prices in transactions that the Act expressly excluded from its coverage.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit:

1. AEP Energy Services; American Electric Power Company, Inc.; CMS Field Services; CMS Marketing Services & Trading Company; Coral Energy Resources, L.P.; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; DMT G.P. LLC; Dynegy Illinois, Inc.; Dynegy GP, Inc.; El Paso Merchant Energy, L.P.; El Paso Corporation; ONEOK Energy Marketing & Trading Co., L.P.; ONEOK, Inc.; Reliant Energy Services, Inc.; The Williams Companies, Inc.; Williams Energy Marketing & Trading Company; Williams Power Company, Inc.; Xcel Energy, Inc.; Northern States Power Company; and e prime, Inc., petitioners on review, were defendants-appellees below.

2. Learjet, Inc.; Topeka Unified School District 501; Breckenridge Brewery of Colorado, LLC; BBD Acquisition Co.; Merricks, Inc.; Sargento Foods, Inc.; Ladish Co., Inc.; Carthage College; Briggs & Stratton Corporation; Arandell Corporation; Newpage Wisconsin System, Inc.; Reorganized FLI, Inc.; Sinclair Oil Corporation; Heartland Regional Medical Center; Prime Tanning Corp.; Northwest Missouri State University; and Multiut Corporation, respondents on review, were plaintiffs-appellants below.

3. Duke Energy Corporation; CMS Energy Corporation; and Reliant Energy, Inc., were defendants-appellees below.

4. Williams Merchant Services Company, Inc. was a defendant-appellee below. It was later known

as Williams Merchant Services Company LLC, but that entity was dissolved on October 2, 2013.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statements of the various respondents are grouped below according to the underlying lawsuit to which they belong.

In *Learjet*: Learjet, Inc. is wholly owned by Bombardier Corp. which is in turn wholly owned by Bombardier Inc. Bombardier Inc. is not publicly traded in the U.S., but is publicly traded on the Toronto, Canada stock exchange. Plaintiff Topeka Unified School District 501 is a state entity and a public school district in Topeka, Kansas, and is therefore not owned by any publicly-held corporation.

In the *Sinclair* cases: Plaintiff Sinclair Oil Company is a wholly-owned subsidiary of the Sinclair Companies. Neither the Sinclair Oil Company nor the Sinclair Companies are publicly traded and no publicly-held company owns more than 10% of the stock of either Sinclair Oil Company or the Sinclair Companies.

In *Breckenridge*: Breckenridge Brewery of Colorado, LLC is jointly owned by BWD Holdings, LLC and Breckenridge Brewery of Denver. No publicly-traded company owns more than 10% of the stock of Breckenridge Brewery of Denver, BWD Holdings, LLC, or Breckenridge Brewery of Colorado, LLC. Plaintiff BBD Acquisition Co. is owned by BWD Holdings, LLC. Both BBD Acquisition Co. and BWD Holdings, LLC are privately-held corporations, and no publicly-held corporation owns 10% or more of their stock.

In *Heartland*: Heartland Regional Medical Center is a private non-profit entity with Heartland Health, also a private non-profit, as its sole member.

As such, Heartland Regional Medical Center is not publicly-held by any corporation. Plaintiff Northwest Missouri State University is a state entity and a public university in Maryville, Missouri, and is therefore not owned by any publicly-held corporation. Plaintiff Prime Tanning, Corp. (currently known as Tasman Leather Group LLC) is owned by Tasman Industries, Inc. Tasman Industries, Inc. is a private corporation, and no publicly-traded corporation owns 10% or more of its stock.

In *Reorganized FLI, Inc.*: Reorganized FLI, Inc. is a non-governmental, private corporate entity. Reorganized FLI, Inc. has no parent corporation and no publicly-held corporation owns 10% or more of the shares of its stock.

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BRIEF FOR RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case arises from petitioners' well-documented conspiracy to inflate the price of natural gas in retail sales to high-volume consumers. Petitioners effectuated this conspiracy in part by manipulating private indices that served as reference points in contracts between them (or their intermediaries) and those consumers. Petitioners' scheme was wildly successful – in the end, too successful. Prices rose so high that they contributed to the Western Energy Crisis of 2000-2002. In the wake of the crisis, respondents – manufacturers, hospitals, educational institutions, and others who purchased gas at inflated rates through retail contracts – brought suit under state antitrust laws.

After an unsuccessful attempt to have the case dismissed under the filed rate doctrine, petitioners have turned to a theory of field preemption under the Natural Gas Act ("NGA" or "the Act"). The NGA gives the Federal Energy Regulatory Commission (FERC) exclusive authority to regulate wholesale transactions; it thus preempts state regulation aimed at FERC's direct concern, the wholesale price of natural gas. At the same time, the NGA reserves to the states the power to regulate retail transactions.

In light of the limited reach of the NGA, this Court has never held that the NGA preempts any state law that, as here, is being applied to retail transactions. Nor has this Court ever held that the NGA preempts any state-law cause of action that, as

here, is grounded in a traditional law of general applicability, as opposed to being directed specifically at gas companies. Petitioners nevertheless argue that the NGA preempts respondents' claims because in the course of their conspiracy, petitioners elected to use the indices they had manipulated to set prices not only for retail sales but also for some of their own wholesale transactions.

The question here is whether this Court should expand the preemptive force of the NGA to allow gas companies to insulate themselves in this manner from traditional state-law liability. It should not.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. As it originally came into being, the natural gas industry involved three separate segments. *See generally E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1036 (9th Cir. 2007). First, producers extracted and gathered gas and sold it to pipelines for interstate transportation. Second, the pipelines transported the gas and sold it to local distribution companies. Third, distribution companies resold the gas to consumers. *See, e.g., Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 502-03 (1942). Each segment was subject only to state regulation and common law. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 514 (1947).

In the early twentieth century, however, this Court held that the Commerce Clause precluded the states from regulating the second step of the process. *See, e.g., Missouri v. Kan. Natural Gas Co.*, 265 U.S. 298, 307 (1924). These decisions created a regulatory "gap" where states controlled both the initial

production and local distribution of natural gas but lacked authority over the middle step – namely, "wholesale rates of gas . . . moving in interstate commerce." *Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 689 (1947).

Congress enacted the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, to fill this gap. *Interstate Natural Gas Co.*, 331 U.S. at 690. The NGA's core jurisdictional provision is Section 1(b). That provision gives the federal government the authority to regulate the interstate transportation of natural gas, as well as sales for resale (also known as wholesale, or "jurisdictional," transactions). 15 U.S.C. § 717(b); *accord Panhandle*, 332 U.S. at 516. After the NGA was passed, the Federal Power Commission (FERC's predecessor) used this new power to set rates for wholesale transactions. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). And to ensure that the federal government's authority to set reasonable rates for wholesale transactions would be effective, Congress also enacted NGA Section 5. That provision allows FERC to determine whether a jurisdictional seller's "practice" directly affecting wholesale rates is unjust or unreasonable, and, if so, to prescribe the reasonable practice "to be thereafter observed and in force." 15 U.S.C § 717d(a).[1]

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[1] The text of Section 5(a) allows FERC to exercise jurisdiction over unjust or unreasonable "practices . . . affecting" wholesale rates. 15 U.S.C § 717d(a). But FERC and the D.C. Circuit have construed the provision, in light of its placement and purpose in the overall statutory scheme, as conferring authority only over practices "directly" affecting wholesale rates. *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1506 (D.C. Cir. 1990).

Nothing in these provisions or any other in the NGA was intended to take power away from the states. "On the contrary," the Act's purpose was "to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions." *Panhandle*, 332 U.S. at 517. In other words, Congress designed the NGA to "complement and in no manner usurp State regulatory authority." *Interstate Natural Gas Co.*, 331 U.S. at 690 (citation omitted); *accord Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 291-92 (1997).

To ensure that "its intent [in this respect] could not be mistaken," *Panhandle*, 332 U.S. at 516, Congress wrote the federal-state dichotomy it envisioned directly into the text of Section 1(b). Not only does that provision grant the federal government authority over wholesale transactions, it also expressly provides that "[t]he provisions of this chapter . . . shall not apply to *any other transportation or sale* of natural gas." 15 U.S.C. § 717(b) (emphasis added). Thus, as before the NGA's enactment, the states retain authority over all "direct sales for consumptive use," *Panhandle*, 332 U.S. at 517 – that is, retail sales.

For decades after the NGA's enactment, gas consumers made the vast majority of their purchases from local utilities. FERC set the rates at which utilities purchased the gas from pipelines, and state

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Both petitioners and the Solicitor General accept that construction here.

utility commissions ensured that utilities did not overcharge when selling the gas to consumers.

2. In the 1970's and 1980's, Congress deregulated much of the natural gas market. *See* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3409 (codified in part at 15 U.S.C. § 3301 *et seq.*) (eliminating price ceilings for certain categories of natural gas sales and removing FERC's authority over "first sales"); Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (accelerating this process); *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408 (Oct. 18, 1985) (effectuating market-based pricing system); *Pipeline Service Obligations and Revisions to Regulations*, 59 F.E.R.C. 61,030 (Apr. 8, 1992) (requiring pipelines to unbundle sales and transportation charges).

This deregulation allowed consumers of natural gas to buy directly from gas producers (or their marketing firms), paying only transportation fees to pipelines and utilities. *See Gen. Motors*, 519 U.S. at 284. Although buying directly was impractical for many residential consumers, most large industrial, commercial, and nonprofit users began buying their own gas in this manner. *Id.* at 283-84. By 2000, nearly 70% all of gas consumed in the United States was purchased through these "direct retail" sales. Pls.' Opp. To Mot. For Summ. J. Ex. 1 at 14, ECF No. 1903-1 (Feb. 1, 2010).

The numerous buyers in the newly formed direct retail market needed some way of discerning fair market prices when negotiating with petitioners and others among the small set of gas sellers. The buyers turned to small private publications such as *Inside*

FERC and *Gas Daily*. J.A. 124. In the 1980's, these publications had begun collecting reports from gas traders about the volume and prices at which natural gas was being sold at various trading points ("hubs") around the country. *Id.* 124-25. No federal law or regulation required gas sellers to provide this information to the publications, and the publications lacked any way of verifying the accuracy of the reports. Instead, traders at natural gas companies informally provided information on the honor system: they gathered data simply by "passing around a form," "using a spreadsheet on a shared drive," or taking "an 'oral survey' to get a sense of where the market was trading." *Id.* 170-71. The traders then passed along this "sense of the market" to the publications, which used it to calculate and publish average prices for each hub on a daily or monthly basis. *Id.* 124-25.

By the mid-1990's, most retail gas sellers were using the indices to set contract prices. A typical contract price provision, for example, read: *Inside FERC* Southern Star Central + $0.31 MMBtu. *See Policy Statement on Natural Gas & Electric Price Indices*, 104 F.E.R.C. 61,121, 61,404 (July 24, 2003).

3. Retail customers' heavy reliance on the indices to negotiate prices for natural gas, combined with the private publications' inability to verify the accuracy of reports that affected the indices, created an opportunity for gas sellers to work together to overcharge these customers. *See E. & J. Gallo Winery*, 503 F.3d at 1031-32. If sellers reported artificially high prices to the indices – either by fabricating sales or engaging in "wash trades" with one another at artificially inflated prices – the indices

would publish higher average prices for gas.[2] J.A. 88. Direct retail customers, in turn, unknowingly would accept those averages as reflective of true market prices and pay them under their contracts keyed to the indices.

No gas company could effectuate this scheme on its own. That is, no company sold gas in high enough volumes that its individual reports to the indices would significantly move the numbers. *See Regulations Governing Blanket Marketer Sales Certificates*, 57 Fed. Reg. 57,952, 57,957-58 (Dec. 8, 1992) (explaining no single company had "market power"). And besides, the indices used formulas designed to exclude outliers before figuring average prices, so high price reports from only a single seller would not have moved the indices. J.A. 125. Hence, the only way to inflate prices in retail transactions by way of index manipulation was for the companies to coordinate their efforts.

Gas sellers seized this opportunity and began manipulating the indices to increase retail prices for gas. In 2003, FERC completed an investigation of index manipulation that took place from 2000 to 2002. *See Final Report on Price Manipulation in Western Markets*, Docket No. PA02-2-000 (F.E.R.C.

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[2] "Wash trades" are defined as "pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk, and no net change in beneficial ownership." *Amendments to Blanket Sales Certificate*, 105 F.E.R.C. 61,217, ¶ 38, ¶ 53 (Nov. 17, 2003). For example, a trade for $10,000 of gas from company A to B combined with an offsetting trade for $10,000 of the same gas from B to A would be a "wash trade."

Mar. 2003) ("*Final Report*") (partially reproduced at J.A. 84-239). Specifically identifying five of the petitioners, the Report found that market participants "provided false reports of natural gas prices and trade volumes to industry publications." J.A. 88. This practice reached "epidemic" proportions. *Id.* One petitioner, for instance, acknowledged that it fabricated 99% of its reports during this timeframe. *Id.* 141-42.

Not only was false reporting rampant in the industry, J.A. 88, but companies conspired with one another to manipulate the indices, *id.* 229. A trader employed by one petitioner, for example, collaborated with another trader to report a false trade, saying, "hey, do you want to fax me . . . exactly what you guys are going to write down so it's more believable . . . I'll just write the exact opposite." *Id.* 303 (internal quotation marks omitted). Thus, while petitioners portray this case as though it involved nothing more than individualized fraud, petitioners in reality colluded in a variety of ways to raise retail gas prices. They even colluded – perhaps to cover their tracks, perhaps to reinforce the reputation of the indices – to peg some wholesale contracts with each other to the indices, *see id.* 632, 640-41, 643-45, even though they knew full well that the indices did not represent true market prices, *see id.* 105 (noting that while six petitioners paid "$48.8 million less" for gas in wholesale transactions in California during the conspiracy "than they would have paid if they had purchased the gas at the index price," they sometimes purchased gas at index prices).

The effects of petitioners' conspiracy were dramatic and "unprecedented." J.A. 85-86. FERC

found that "spot gas prices" within the relevant time period "rose to extraordinary levels" and identified "efforts to manipulate price indices" as a factor contributing to this increase. *Id.* 86. Retail natural gas prices in Wisconsin, for instance, "more than doubled." *Id.* 312. Reorganized Farmland Industries (FLI) experienced such enormous price increases in 2001 that it was no longer able to produce and sell fertilizer at a profit. Farmland's Resp. in Opp. to Mot. to Compel Produc. 7, ECF. No. 1831 (filed under seal pursuant to ECF No. 1849) (Nov. 2, 2009) (referencing deposition testimony of Rich Schuck).

4. The NGA does not give FERC any power to impose liability on sellers who overcharge for gas in retail transactions. Accordingly, FERC has not sought – nor could it seek – to require petitioners to compensate respondents for the harm they suffered as a result of this conspiracy.

In 2003, after the misconduct leading to the crisis was unearthed, FERC issued a Code of Conduct forbidding sellers from misreporting wholesale prices to the indices. *Amendments to Blanket Sales Certificates*, 68 Fed. Reg. 66,323, 66,323-37 (Nov. 26, 2003). But even then, FERC explained that it lacked the authority to regulate reporting practices with respect to direct sales for consumptive use, such that "a portion of the market [would] not be subject to these regulations." *Id.* at 66,325-26.

In the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (commonly known as the "EPAct"), Congress enlarged FERC's authority to forbid gas companies from using any "manipulative or deceptive device" "directly or indirectly . . . in connection with" any jurisdictional sale of natural

gas. 15 U.S.C. § 717c-1. According to FERC, this 2005 statute enlarged its authority to regulate "*non*-jurisdictional entities' manipulative reporting about, and wash-trade practices purporting to involve, non-jurisdictional sales when they are used to manipulate wholesale gas rates." U.S. Br. 32 n.7.

B. Procedural History

1. Respondents are manufacturers, hospitals, educational institutions, an agricultural cooperative, and other entities that made direct retail purchases of natural gas from 2000 through 2002. *See, e.g.*, J.A. 321-22, 360. They filed lawsuits in state and federal courts, alleging that petitioners' conspiracy to manipulate the retail prices of natural gas violated state antitrust law. *Id.* 240-584.[3] Petitioners removed the state cases to federal court, and all of the cases were later consolidated into multidistrict litigation in the District of Nevada.

Petitioners first sought dismissal on the basis of the filed rate doctrine. Pet. App. 20a-21a. Because FERC had issued them "blanket marketing certificates" during the time period at issue, thereby allowing them to charge market-based rates, petitioners argued that the indices were in effect FERC-approved rates. This argument hit a dead end, however, when the Ninth Circuit held in *Gallo* and two other cases from this multidistrict litigation that "the filed rate doctrine does not bar state or

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[3] One respondent, Sinclair Oil Corporation, alleges not only state antitrust claims, but also a variety of other state and federal claims. Petitioners do not advance any distinct arguments regarding these latter claims.

federal antitrust claims arising out of manipulation of the price indices because the challenged price indices were compiled using transactions outside of FERC's jurisdiction as well as transactions within FERC's jurisdiction." *Id.* 21a (citing *Gallo*, 503 F.3d at 1048); *see also Texas-Ohio Energy, Inc. v. AEP Energy Servs.*, 243 Fed. Appx. 328 (9th Cir. 2007); *Abelman Art Glass v. AEP Energy Servs.*, 248 Fed. App'x 821 (9th Cir. 2007). "Misreported rates and rates reported for fictitious transactions are not FERC-approved rates." *Gallo*, 503 F.3d at 1045.

The *Gallo* decision and its counterparts limited petitioners to pressing their back-up argument that the NGA – as it existed before the EPAct of 2005 – impliedly preempts respondents' claims. After the district court denied their motion to dismiss, petitioners filed a motion for summary judgment based on this argument. The district court denied this motion as well. J.A. 37-62. Petitioners then moved for reconsideration. Eighteen months later, the district court granted the motion and announced its intention to revisit petitioners' implied preemption argument. Pet. App. 124a-136a.

Seeking to protect themselves against any adverse ruling on reconsideration regarding their state-law claims, several respondents quickly moved to amend their complaints to add federal antitrust claims. Pet. App. 40a-41a. The proposed federal claims sought to challenge the exact same conduct as their state antitrust claims. Without finding that petitioners would be prejudiced in any way by such an amendment, the district court denied these motions. *Id.* 41a; *see also* Order on Pls.' Mot. to

Modify Scheduling Order, ECF No. 1958 (Oct. 10, 2010).

After letting almost another whole year pass, the district court reversed its earlier position and held that the NGA occupies a field that categorically displaces state law with respect to any practice that directly affects wholesale rates. Pet. App. 115a. That is so, in the court's view, regardless of whether the practice at issue – as here – also falls within the power that Section 1(b) reserves to the states to regulate retail transactions or involves matters over which states otherwise have traditional regulatory authority. *See id.* 133a-34a. Applying this "directly affects" preemption test, the district court concluded that petitioners' "manipulation of the indices directly affect[ed] jurisdictional rates" because petitioners had elected to use indices to set prices not only for retail transactions involving direct consumers such as respondents but also for at least some wholesale transactions. *Id.* 112a.

2. The Ninth Circuit reversed in a unanimous opinion by Judge Bea. Relying on this Court's decision in *Northwest Central Pipeline Corp. v. State Corp. Commission*, 489 U.S. 493 (1989), the court of appeals began by noting that the authority that NGA Sections 1(b) and 5(a) grant the federal government to regulate practices affecting wholesale rates cannot "nullify[] the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority" over retail sales. Pet. App. 30a-32a; *see also id.* 24a. Because respondents seek compensation for anticompetitive practices falling within that reservation to the states of regulatory authority, the

court of appeals then reasoned, the NGA cannot displace their state-law claims. *Id.*

Even if it had agreed with the district court that the NGA preempts all state-law claims arising from practices that directly affected wholesale rates, the court of appeals indicated that it still would not have held respondents' claims preempted. Drawing on *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1503, 1506 (D.C. Cir. 1990), in which the D.C. Circuit held that FERC lacks authority to regulate under NGA Section 5(a) unless the practice at issue "directly govern[s] the rate in a jurisdictional sale," the Ninth Circuit stressed that any preemptive force arising from FERC's Section 5(a) jurisdiction could not stretch "broadly." Pet. App. 31a. In the court of appeals' view, construing the NGA to preempt state authority over index "reporting practices associated with nonjurisdictional sales" would go too far. *Id.* 32a.

Having held that respondents could proceed on their state antitrust claims, the court of appeals ruled that the district court had not abused its discretion in denying leave to add federal antitrust claims. Pet. App. 42a-43a.

3. This Court granted certiorari to review the court of appeals' preemption holding. 134 S. Ct. 2899 (2014).

SUMMARY OF ARGUMENT

The Natural Gas Act – as it existed before 2005 – does not preempt respondents' state antitrust claims.

I. Petitioners and the Solicitor General advance a theory constructed of selectively cropped case quotations and wishful thinking. According to them, the NGA field preempts a state-law claim whenever

it concerns a practice that "directly affect[s] jurisdictional rates" and thus falls within FERC's Section 5(a) authority. Petr. Br. 2, 19; *see also* U.S. Br. 13. But this Court has never adopted any such rule. Rather, an unfiltered review of NGA case law makes clear that the NGA field preempts state law only when two things are present: (A) a state "cross[es] the dividing line so carefully drawn by Congress in NGA § 1(b)" that separates retail from wholesale transactions, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989); and (B) state law is "directed at" the natural gas industry, such that it is capable of "affect[ing] the ability of FERC to regulate comprehensively . . . the transportation and sale of natural gas," *Schenidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-10 (1988).

Neither of those conditions is present here. First, respondents seek to apply state law only in the context of retail transactions, which are firmly on the states' side of the NGA Section 1(b) dividing line. Even if respondents' claims also somehow implicate some practice falling within FERC's Section 5(a) authority, respondents' suits may proceed because petitioners do not (and could not) show that respondents' state antitrust theories conflict with any FERC rule or regulation.

Second, respondents' state antitrust theories are grounded in "traditional" state law, *Schneidewind*, 485 U.S. at 308 n.11, that is incapable of impeding FERC's ability to regulate. The NGA does not displace federal antitrust law, and respondents' state-law theories challenge nothing more than conduct that federal antitrust law also forbids.

II. Even if this Court were inclined to vastly expand the NGA's field preemptive force by barring any state-law claim that implicated a "practice" that directly affected wholesale rates, it would still have to affirm. The conduct at issue here – colluding to inflate prices in retail transactions – does not directly affect wholesale rates because no rule or regulation requires sellers to price wholesale transactions the same way they price retail transactions.

And even if the relevant practice here were defined more narrowly as index reporting alone, that practice would still not have fallen within FERC's Section 5(a) authority. Much of the reporting at issue here involved non-jurisdictional sales, which, by definition, fell beyond FERC's pre-2005 authority. Furthermore, the only reason *any* index reporting influenced wholesale prices was that petitioners themselves voluntarily elected to use the indices – knowing full well they did not represent true market prices – as price points not only for retail but also for certain wholesale transactions. This kind of intervening, conspiratorial act precludes finding any "direct effect" that could trigger NGA preemption. Otherwise, petitioners' theory would allow natural gas sellers to insulate themselves from virtually any state law simply by pegging wholesale prices to that law.

ARGUMENT

I. The NGA Does Not Preempt Respondents' Claims Because The Claims Involve Matters That The NGA Reserves To The States.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). And where, as here, a party asserts that field preemption exists in a particular regulatory sphere, the question is whether Congress "legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989).

The text of the NGA, as well as this Court's precedent describing Congress's intent in passing it, demonstrate that the NGA leaves the states substantial room to supplement federal law. In particular, Section 1(b) of the Act expressly denies FERC the authority to regulate "the production or gathering of natural gas" or "any . . . transportation or sale of natural gas" besides wholesale transactions. 15 U.S.C § 717(b). Those non-wholesale matters are "reserved to the states." *Nw. Cent.*, 489 U.S. at 507; *see generally Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 517 (1947). Further, this Court has made clear that Congress did not intend the NGA to displace "traditional" modes of state regulation – for example, "blue sky" securities laws and labor laws – that apply generally to all companies doing business in the state and are not "directed at" the gas industry.

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 308 & n.11 (1988).

Both of these forms of reserved state power are present in this case. Respondents' claims fall within Section 1(b)'s reservation of state authority because they arise from retail transactions. In addition, respondents' claims are grounded in traditional state antitrust law, as opposed to state regulation directed specifically at the natural gas industry.

A. Respondents' Claims Fall Within NGA Section 1(b)'s Express Reservation Of State Authority Over Retail Transactions.

The language and structure of the NGA, as well as this Court's precedent, demonstrate that when state-law claims arise from matters that Section 1(b) reserves to the states, the claims necessarily fall outside of any preemptive field. Contrary to petitioners' argument, this is so even if the state-law claims implicate practices that also directly affect wholesale rates. In that circumstance, state law must give way only to the extent that it conflicts with the NGA; the NGA otherwise allows state law to coexist with FERC rules and regulations.

1. This Court's decision in *Northwest Central* establishes that when state-law claims regulate matters that Section 1(b) of the Act reserves to the states, the claims necessarily fall outside of any preemptive field. In *Northwest Central*, a Kansas law provided that certain gas producers would lose the right to extract gas from wells connected to a common source if they failed to extract that gas before various deadlines. 489 U.S. at 497. This was "precisely the sort [of law] that Congress intended by

§ 1(b) to leave within a State's authority"; it fell within "the States' retention of their traditional powers to regulate rates of production, conserve resources, and protect correlative rights." *Id.* at 512, 514. Thus, "[t]o avoid encroachment on the powers Congress intended to reserve to the States," this Court unanimously held that the NGA did not field preempt the Kansas law. *Id.* at 512.

2. Petitioners and the Solicitor General advance a far broader conception of the NGA's preemptive field. According to them, the NGA nullifies forbids state-law claims arising from retail transactions whenever they implicate a practice FERC has authority to regulate under Section 5(a) because the practice "directly affect[s] jurisdictional rates." Petr. Br. 19; *accord* U.S. Br. 14. In service of this theory, petitioners and the Solicitor General characterize *Northwest Central*'s holding as turning on a finding that FERC lacked regulatory authority over the specific practice at issue because the effect of the practice on wholesale rates was "too remote." Petr. Br. 36; *see also* U.S. Br. 30.

This reading of *Northwest Central* cannot withstand scrutiny. Where a state-law claim concerns a matter that Section 1(b) reserves to states but also implicates a practice that Section 5(a) may authorize FERC to regulate, *Northwest Central* explains that applying conflict preemption – not invariably ousting state law altogether – is the solution. And none of the other authority that petitioners summon in support of their argument indicates otherwise.

a. *Northwest Central* turned on whether the state law at issue was regulating a matter "reserve[d]

to the States," not on whether FERC had authority under Section 5(a) to regulate the some aspect of the what the state was regulating. 489 U.S. at 512. The challenged state regulation there was designed to incentivize pipelines to purchase gas from underused wells, *id.* at 505, thereby having "some impact on the purchasing decisions and hence costs of interstate pipelines," *id.* at 516. This Court, therefore, repeatedly acknowledged that the state regulation was expected to "have some effect on interstate rates." *Id.* at 513; *see also id.* at 515 (law would have "some effect on the practices or costs of interstate pipelines subject to federal regulation"); *id.* at 517 (state law "may affect pipelines' costs"). That is, the Kansas law regulated not only matters within the states' reserved powers but also seemingly implicated a practice "within FERC's exclusive authority under the NGA." *Id.* at 506-07; *see also id.* at 515 n.12 (noting that "each agency" – that is, both the state and FERC – had authority "within its assigned sphere").

This Court, however, never felt any need to pinpoint the degree to which the state regulation would "impact on matters within federal control." *Id.* at 516. Even assuming that FERC had authority over some aspect of what the state was regulating, this overlap of regulatory interests could not trigger field preemption: "To find field pre-emption of Kansas' regulation merely because [wholesale rates] might be affected would be largely to nullify that part of NGA § 1(b)" that reserves power to the states. *Id.* at 514. Instead, to "prevent diminution of the role that Congress reserved to the States while at the same time preserving the federal role," the framework that applies in situations of overlapping

authority is "conflict-pre-emption analysis." *Id.* at 515. "Only by applying conflict-pre-emption analysis," this Court explained, "can we be assured that *both* state and federal regulatory schemes may operate with some degree of harmony." *Id.* at 515 n.12 (emphasis in original).

b. Other NGA precedent – much of it referenced in *Northwest Central* – confirms that the NGA does not automatically preempt state law whenever it applies to a practice that has a direct effect on wholesale rates. Time and again, this Court has stressed that the NGA "was drawn with meticulous regard for the continued exercise of state power, *not to handicap or dilute it in any way.*" *Panhandle E. Pipe Line Co. v. Pub. Servs. Comm'n*, 332 U.S. 507, 517-18 (1947) (emphasis added); *see also Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690 (1947) (NGA was "drawn as to complement *and in no manner usurp* State regulatory authority") (emphasis added) (citation omitted); *Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506-08 (1942) (same). And before the NGA was enacted, states had the power to regulate direct sales for consumptive use. *See, e.g., Panhandle*, 332 U.S. at 517 n.12. Accordingly, that a state law governing retail sales might also implicate FERC's post-NGA authority to regulate a practice directly affecting wholesale rates cannot mean that FERC's authority "swallow[s]" the state Section 1(b) power over retail sales. *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 508 (1949). The authority that Section 1(b) reserves to the states over such sales must persist – so long as no conflict exists – regardless of a practice's effect on wholesale rates.

Northwest Central's repeated citations to *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), reinforce the point. *See Nw. Cent.*, 489 U.S. at 512, 515 n.12. *Louisiana Public Service Commission* arose under the Communications Act, which, like the NGA, assigns exclusive authority to the federal government over interstate activities but reserves power to the states over local matters. 476 U.S. at 369-70; *see* 47 U.S.C. §§ 152, 220. In particular, the case concerned accounting matters that the Communications Act reserved to the states but that also "significantly affect[ed], among other things, the rates that customers pay for [interstate] service." *La. Pub. Serv. Comm'n*, 476 U.S. at 364; *see also id.* at 373 (describing "severe impact" that practice at issue would have "on the interstate communications network"). The state law at issue thus implicated a practice "conceivably within the jurisdiction of both federal and state authorities." *Id.* at 360.

Much like petitioners and the Solicitor General do here, the FCC argued that the effect of the accounting practices on interstate service conferred "exclusive regulatory power . . . on the FCC, thus raising a claim that Congress ha[d] manifested a clear intent to displace state law." *Id.* at 369. But in light of the "express jurisdictional limitations on [federal] power" in the statute and the "*dual* regulatory system" that Congress created, this Court held that a state law falling within this reservation of state authority could not be field preempted. *Id.* at 370 (emphasis in original).

So too with respect to the NGA. Indeed, no other method of dealing with jurisdictional overlaps with

respect to gas regulation would make sense. Imagine that a gas company entered into contracts to sell gas in wholesale transactions at prices keyed to "the price at which the seller sold gas the week before in retail transactions." Under petitioners' theory that the NGA preempts state claims concerning any reference points that appear in contracts for wholesale gas transactions, states would lose the ability to regulate retail rates, even in a manner wholly consistent with federal law. The absurdity of such an outcome – and its stark incompatibility with congressional intent – reveals that petitioners' theory cannot be right.

c. Petitioners and the Solicitor General nevertheless insist that other cases establish that "the preemption analysis [under the NGA] does *not* change when a state purports to regulate matters within state authority." Petr. Br. 23 (emphasis added); *see also* U.S. Br. 30. In support of this proposition, they cite *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), along with four other cases: *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84 (1963); *Transcontinental Gas Pipe Line Corporation v. State Oil & Gas Board (Transco II)*, 474 U.S. 409 (1986); *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 621 (1972); and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988). Petr. Br. 23-28; *see also* U.S. Br. 17 (relying on *Schneidewind*, *Northern Natural*, and *Transco II*). These cases, petitioners and the Solicitor General maintain, collectively establish that "state authority" under Section 1(b) must give way whenever a state-law claim arises from a practice that directly affects wholesale rates. U.S. Br. 14; *see also* Petr. Br. 23.

That is not how the Solicitor General interpreted *Northern Natural*, *Transco II*, and *Schneidewind* in its briefs in *Northwest Central*. In those filings, the Government made no mention of any "direct effect" test for preemption. Instead, the Government explained that "the 'field occupation' sort of preemption [wa]s not applicable" in *Northwest Central* because "the Kansas order at issue here (unlike the state regulations at issue in *Northern Natural*, *Transco* [*II*], and *Schneidewind*) by its terms regulates producers, and gas production, not pipelines and their activities." U.S. Cert. Br. at 12-13, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493 (1989) (No. 86-1856); *see also* U.S. Br. at 12, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493 (1989) (No. 86-1856) ("[T]he state orders in *Northern Natural* and *Transco [II]* . . . were preempted because they involved state regulation of interstate pipelines," whereas "[t]he Kansas order at issue [in *Northwest Central* was] an exercise of" the authority that "[t]he NGA specifically reserves to the states.").

This Court agreed. It explained that "[i]n *Northern Natural* and *Transco* [*II*], States had crossed the dividing line so carefully drawn by Congress in NGA § 1(b) . . . , trespassing on federal territory." *Nw. Cent.*, 489 U.S. at 514. Likewise, in *Schneidewind* the state law "could not plausibly be said to [have] operate[d] in the field expressly reserved by the NGA to the States." *Nw. Cent.*, 489 U.S. at 513 n.10. By contrast, "Kansas ha[d] regulated" in *Northwest Central* "firmly on the States' side of that dividing line." *Id.* at 514. Consequently, *Northwest Central* distinguished *Northern Natural*, *Transco II*, and *Schneidewind* on

the ground that none of those cases involved a state law operating in "the field expressly reserved by the NGA to the States." *Id.* at 513-14. *Northwest Central* did not distinguish those cases on the basis that the effect on wholesale rates of the various practices at issue in those cases was more "direct."

The Court in *Northwest Central* did not feel the need to discuss *Louisiana Power* and *Mississippi Power*, the other two cases on which petitioners rely, but they are easily distinguishable as well.

In *Louisiana Power*, the practice at issue (interstate transportation of gas) fell "within [FERC's] jurisdiction under the opening sentence of § 1(b)" and outside of "the proviso's exemption for direct sales." 406 U.S. at 638. The case, therefore, has nothing to say about the situation in which states are acting within their reserved sphere of authority.

In *Mississippi Power*, a state did attempt to exercise "its undoubted jurisdiction over retail sales." 487 U.S. at 372. But this Court did not invalidate the state regulation under field preemption principles. Instead, this Court held – consistent with *Northwest Central's* framework for dealing with overlaps in jurisdiction – that the state law could not be enforced because it "conflict[ed] with" federal authority. *Id.* at 377. "States," this Court explained, "may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *Id.* at 371.

Petitioners ignore the conflict-preemption reasoning in *Mississippi Power*, fixating instead on Justice Scalia's statement, concurring in the judgment, that "[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot

have jurisdiction over the same subject." 487 U.S. at 377. But this statement should not be wrenched out of context. The state regulation in *Mississippi Power* allowed the state to consider for itself the "prudency" of the same power allocations that FERC had already determined to be just and fair. *Id.* at 375. Thus, the state law, by its nature, was incapable of being consistent with federal law. Reassessing FERC's determinations necessarily "interfere[d] with federal authority over the same activity." *Id.* at 377 (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-319 (1981); *see also id.* at 380 (Scalia, J., concurring in the judgment).

3. NGA Section 1(b) authorizes the states to regulate "direct sales for consumptive use." *Panhandle*, 332 U.S. at 517. And there is no dispute that all of the respondents' claims arise out of direct sales for consumptive use. The Ninth Circuit thus took it as a given – and petitioners do not dispute – that respondents' claims implicate "the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority over nonjurisdictional sales." Pet. App. 31a-32a.

The Solicitor General, however, resists this straightforward analysis. According to the Solicitor General, respondents' claims fall outside of the states' Section 1(b) authority because rather than arising from "retail sales themselves," the claims arise from manipulative practices that "affect[ed] the price for *subsequent* retail sales." U.S. Br. 27.

The Solicitor General's hairsplitting misconceives respondents' claims. Respondents are not pursuing fraud claims that would punish petitioners' deception of the index publishers.

Rather, they are bringing *antitrust* claims that seek to hold petitioners liable for colluding to inflate prices for retail gas. Hence, respondents' claims obviously concern retail sales themselves and thus implicate the states' Section 1(b) authority to regulate retail sales.

Nothing in *Louisiana Power* – the only case the Solicitor General cites in support of its argument – undercuts this reasoning. In stating that Section 1(b) withholds from FERC only "rate-setting authority with respect to direct sales," *Louisiana Power* held simply that Section 1(b) does not reserve to the states power to regulate the interstate "transportation," as opposed to retail sales, of gas. 406 U.S. at 637-38. It said nothing about whether Section 1(b) authorizes the states to regulate the methods by which retail prices are established. The only case that speaks to *that* issue is *Panhandle*, which accepted that Section 1(b)'s proviso reserves states the authority not only to set retail rates themselves but also to regulate the "rules and regulations" and "service" involved in sellers' retail transactions. 332 U.S. at 509; *see also Northwest Central*, 489 U.S. at 511 (states' Section 1(b) power over production extended beyond the "drilling and spacing of wells" to "prevent[ing] waste and protect[ing] correlative rights" of producers) (internal quotation marks and citation omitted). There is no doubt, therefore, that prohibiting sellers from colluding to inflate retail prices falls within the states' Section 1(b) authority.[4]

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[4] Citing *Transco II*, the Solicitor General also suggests that the Ninth Circuit erred insofar as it suggested categorically that

4. Because respondents' claims involve matters over which Section 1(b) preserves state authority, they can be preempted only if they fail "conflict-preemption analysis." *Nw. Cent.*, 489 U.S. at 516. Yet petitioners do not argue that respondents' claims conflict with federal law. The most they contend is that a "potential for conflict" exists. Petr. Br. 32. But when conflict preemption applies, "the existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of [a] state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *accord PLIVA Inc. v. Mensing*, 131 S. Ct. 2567, 2587 (2011). Accordingly, the court of appeals' decision should be affirmed.

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all "first sales" fall within the states' Section 1(b) reservation of power. U.S. Br. 26. It is true that *wholesale* transactions statutorily defined as "first sales" fall outside of the states' Section 1(b) authority. *See Transco II*, 474 U.S. at 422. But the only "first sales" at issue in this case are direct sales for consumptive use from "wellheads" and "sellers in Canada and Mexico." Pet. App. 32a. Petitioners have never distinguished in their preemption theory between those kinds of first sales and other direct sales for consumptive use. Instead, petitioners have correctly treated all of the sales at issue as "retail transactions." Pet. Br. i; *see also Panhandle*, 332 U.S. at 516 & n.12 (noting that Section 1(b) reserves power to the states "when and if [a] first sale" from another jurisdiction is "necessarily the last sale because consummated by consumption") (quotation marks and citations omitted).

B. Respondents' Claims Are Grounded In Traditional Antitrust Statutes That In No Way Undermine FERC's Ability To Regulate.

Respondents' claims also fall within authority the NGA leaves to the states because – as the only federal court of appeals to consider the issue has held – the NGA does not displace the states' traditional authority to prohibit anticompetitive conduct that federal antitrust law also forbids. *See Illinois v. Panhandle E. Pipeline Co.*, 935 F.2d 1469, 1479-80 (7th Cir. 1991).

1. The NGA field preempts state law only where that law is "directed at . . . things over which FERC has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). In other words, the NGA preempts state law only when that law "affect[s] the ability of [FERC] to regulate comprehensively" with respect to interstate transportation or wholesale rates. *Id.* at 310 (quoting *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963)).

That being so, this Court made clear in *Schneidewind* that the NGA does not preempt "traditional" state regulation that neither is "directed at" the gas industry nor threatens to affect FERC's ability to regulate comprehensively and effectively. *Id.* at 308 & n.11. This Court offered as an example a state "'blue sky' law that governs the registration and sale of securities sold within [a] State." *Id.* "[S]uch traditional 'securities regulation'" is not preempted by the NGA because it "is not FERC's direct concern." *Id.* So too with respect to various other forms of generalized state regulation, such as laws

"protect[ing] investors from fraudulent or deceptive issuances" of securities, *id.* at 310 n.13, and labor and employment laws. Such state laws might occasionally cover practices that directly affect wholesale prices of natural gas, but the NGA need not displace them unless they threaten to impede FERC's ability to do its job.

The same type of analysis applies to other statutes that operate like the NGA. In cases involving other statutes that occupy certain fields, this Court has repeatedly held that such statutes do not preempt traditional state-law claims absent some adverse effect on the federal scheme. *See, e.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002). In *Silkwood*, for example, the Court considered whether the Atomic Energy Act, which "occupie[s] the entire field of nuclear safety concerns," preempted certain "traditional principles of state tort law." 464 U.S. at 249, 255. The defendants argued that state law had to be preempted because it could require power plants to "conform to state standards" with respect to practices that the federal government also regulated. *Id.* at 255-56. This Court rejected the argument, holding that traditional state tort law applied "with full force" insofar as it would not "frustrate the objectives of the federal law." *Id.*

Petitioners respond that *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), shows that a federal statute that occupies a field can displace even traditional state-law claims. Petr. Br. 23. This is no doubt true. But it is a question of congressional intent. When a federal statute's

coverage is designed to be "categorical[ly]" exclusive, even traditional state law must give way when it is "directed to the same subject" as the federal law. *Kurns*, 132 S. Ct. at 1268-69 (quoting *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 612 (1926)). Thus, in *Kurns*, this Court distinguished *Silkwood* and held that the Locomotive Inspection Act (LIA) preempted state-law tort claims because the LIA was designed to "occup[y] the entire field of regulating locomotive equipment" and the state law was aimed at the same thing. *Id.* at 1267-70 (quoting *Napier*, 272 U.S. at 611-12).

The situation here resembles *Silkwood*, not *Kurns*. This Court has never held that the NGA preempts not only certain state regulation directed at the gas industry but also traditional state-law claims whenever a plaintiff seeks to apply such law to a practice that had a direct effect on wholesale rates. And for good reason: The purpose of Section 5(a)'s grant of authority over practices directly affecting wholesale rates is to ensure that FERC has the "tools" it needs to effectively regulate wholesale rates under Section 1(b). *Schneidewind*, 485 U.S. at 301. Thus, if a traditional state law that applies to a certain "practice" covered by Section 5(a) does not directly affect FERC's ability to do that job, there is no reason for the NGA to preempt it. *See id.* at 308 & n.11.

2. Just like the state blue sky law that *Schneidewind* explained would not be displaced by the NGA, state antitrust claims fall outside the Act's field-preemptive reach. Antitrust law "is an area traditionally regulated by the States." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *see also id.*

(describing the "long history of state common-law and statutory remedies against monopolies and unfair business practices"). Indeed, this Court "has consistently held that nothing in the federal antitrust laws *or any other body of federal law* indicates that Congress intended to displace state antitrust law." Herbert Hovenkamp, *Federal Antitrust Policy* § 20.8 (4th ed. 2011) (emphasis added).

This is especially so with respect to the NGA. Congress did not intend in the NGA "to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). This Court, accordingly, has squarely held that the NGA does not displace federal antitrust law. *Id.* at 374; *accord California v. FPC*, 369 U.S. 482, 490 (1962). And both petitioners and the Solicitor General have conceded that respondents could have proceeded with federal antitrust claims respecting the conduct at issue here. *See* Petr. Br. 32; Dfts. Joint Reply in Supp. of Renewed Mot. and Mot. for Summ. J. 13, ECF No. 1910 (Feb. 26, 2010); U.S. Br. 24.[5]

Given that the NGA would permit respondents to bring federal antitrust claims respecting the conduct

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[5] After conceding this point without qualification at the certiorari stage, *see* U.S. Cert. Br. 17-18, the Solicitor General now suggests that the filed rate doctrine, if applicable, might sometimes preclude a federal antitrust claim. U.S. Br. 24. But the lower courts have held that the filed rate doctrine does not apply in this case, Pet. App. 21a, and petitioners do not challenge that holding. Nor do petitioners ask this Court to overrule the holdings in *Otter Tail* and *California v. FPC* that the NGA does not displace federal antitrust law.

at issue, there is no reason why the NGA should preempt state antitrust law insofar as "state antitrust law only mirrors federal antitrust law." *Illinois*, 935 F.2d at 1479. To the contrary, the "primary aim" of the NGA is "to protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *accord Cities Serv. Gas. Co. v. FPC*, 176 F.2d 548, 552 (10th Cir. 1949). It would thus be "an exceedingly incongruous result if a statute so motivated" were construed "to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption." *Panhandle*, 332 U.S. at 519; *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 450 (2005) (using similar reasoning to divine congressional intent and reject preemption argument).

Put in the parlance of *Schneidewind*: state antitrust claims cannot possibly "affect[] the ability of [FERC] to regulate comprehensively . . . the transportation and sale of natural gas" when they require nothing more than what federal antitrust law already requires, *Schneidewind*, 485 U.S. at 310 (quoting *N. Natural*, 372 U.S. at 91-92) (alterations in original), and the NGA does not displace federal antitrust law.

3. That leaves petitioners' two-part argument that applying state antitrust law in this particular case would create a "possibility of collision between state and federal regulation." Petr. Br. 29. No such possibility exists.

Petitioners first suggest that NGA Section 5(a) gives FERC the authority to regulate index reporting

practices – a power petitioners assert is manifested in FERC's 2003 Code of Conduct – and that respondents' lawsuits could theoretically result in liability for conduct that the Code of Conduct allows. Petr. Br. 30-32. But FERC's Section 5(a) power is prospective only, permitting it to prescribe rules "to be thereafter observed and in force." 15 U.S.C § 717d(a); *see also Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) ("By its terms, [Section 5(a)'s counterpart in the FPA] only comes into play when the Commission has had a hearing and finds that a 'rate, charge, or classification' employed by a regulated utility in its jurisdictional transactions is 'unjust, unreasonable, unduly discriminatory or preferential.'"). The Code of Conduct, therefore, does not apply to petitioners' actions at issue here.

In any event, petitioners never point to any specific conduct that the 2003 Code of Conduct allows for which respondents seek to impose liability. Nor could they. Respondents have made clear (*see, e.g.*, Learjet BIO 15), and petitioners do not dispute, that respondents seek nothing more than to hold petitioners liable under state law for conduct that federal antitrust law also prohibits. *See generally United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("[A] combination formed for the purpose and with the effect of raising . . . the price of a commodity . . . is illegal per se."). This case thus stands in stark contrast to *Schneidewind*, where the Court concluded that an "imminent possibility of collision" existed because FERC had the power to institute equity requirements inconsistent with those in the state law at issue. 485 U.S. at 310. Here,

FERC is powerless to condone the conduct that respondents challenge.

And even if respondents' claims could somehow forbid index reporting practices that FERC had the power to allow, FERC would still not be hampered in its ability to regulate wholesale rate-setting. All FERC would have to do if it disagreed with the states would be to require that indices reflecting wholesale prices be created and used separately from indices creating retail prices. *See* U.S. Br. 28 n.6 (noting feasibility of this measure); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 (1986) (noting that the FCC could take similar action in order to preserve exclusive power over interstate component of a certain practice).

No doubt aware of these realities, petitioners retreat to asserting that a possibility of collision exists because three of the states involved here – Kansas, Colorado, and Wisconsin – allow courts to calculate damages for antitrust violations differently than "their federal counterparts." Petr. Br 32. In particular, petitioners complain that whereas federal law provides a treble-damages remedy for antitrust violations, *see* 15 U.S.C. § 15(a), these three states would allow plaintiffs to recover the full price they paid for gas at inflated prices. *Id.* This appears to be an argument that the federal antitrust statutes, rather than the NGA, preempt respondents' claims – and thus is outside the question presented.

At any rate, the argument lacks merit. It is unclear whether treble damages or full consideration will yield a larger recovery here; it depends on whether petitioners inflated prices by more than one-third over a fair market rate. But even if a full-

consideration remedy is more favorable, this Court has consistently held that state antitrust claims "are not preempted solely because they impose liability over and above that authorized by federal law." *ARC Am.*, 490 U.S. at 105; *see also Illinois*, 935 F.2d at 1480 (applying this rule in context of antitrust claims concerning natural gas purchases). This is because in the antitrust realm, as elsewhere, a stronger state-law remedy for conduct that both federal and state law forbid does not require any change in primary conduct. Instead, it simply gives defendants "an additional cause to comply" with those substantive mandates. *Bates*, 544 U.S. at 448 (2005) (citing *Medtronic v. Lohr*, 518 U.S. 470, 513 (1996) (O'Connor, J. concurring in part and dissenting in part)); *accord Medtronic*, 518 U.S. at 495 (state law providing for money damages does not conflict with federal law forbidding same conduct but not providing damages remedy); *Silkwood*, 464 U.S. at 257 (punitive damages allowed under state law but not available under federal law did "not conflict with [the federal remedial] scheme").[6]

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[6] Even if respondents' claims were somehow preempted insofar as they afforded more generous remedies than federal antitrust law, the solution simply would be to bar respondents from invoking full consideration remedies and to require them instead to proceed under the state-law provisions that they have alternatively invoked that require treble damages. *See* J.A. 244 (citing Wis. Stat. § 133.18); J.A. 367-69 (citing Kan. Stat. Ann. § 50-161); Colo. Rev. Stat. § 6-4-114.

II. Petitioners' Argument That The NGA Field Preempts Respondents' Claims Because The Claims Concern A "Practice" That Had A Direct Effect On Wholesale Rates Fails Even On Its Own Terms.

Even if petitioners were correct that the NGA preempts any state claim concerning a "practice" that falls within Section 5(a) – that is, any practice by a jurisdictional seller that directly affects wholesale rates – the NGA would still not preempt respondents' claims. Respondents do not challenge, as petitioners would have it, mere "index manipulation." Petr. Br. 19. Instead, the only thing state law is regulating in these antitrust lawsuits, properly conceptualized, is conspiring to inflate prices in retail transactions. Such conspiratorial actions have no direct effect on wholesale rates. And even if the practice at issue were simply index reporting, that practice still would not have fallen under FERC's Section 5(a) authority.[7]

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[7] Contrary to petitioners' assertion (Petr. Br. 40), respondents have not waived their argument that there is no direct effect here. They have pressed this alternative argument at every step of the case. In the district court, respondents argued that "[a]t most, defendants' false reporting 'directly affected' published *price indices*, not jurisdictional rates." Pls.' Opp'n to Defs.' Mot. for Summ. J. 23, ECF No. 1900 (Feb. 1, 2010). They then urged the Ninth Circuit to follow the reasoning in *Am. Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), in which the D.C. Circuit held that FERC has authority over matters "directly govern[ing] the rate in a jurisdictional sale," but not matters affecting jurisdictional rates only "indirectly." *Id.* at 1506-07; *see* Learjet C.A. Opening Br. 36. When petitioners responded (as they do again here, *see* Petr. Br. 36 n.5), that *American Gas* does not apply because the

A. The Practice Of Conspiring To Use The Indices To Set Prices In Retail Transactions Does Not Directly Affect Wholesale Rates.

Antitrust law does not prohibit fraud or deceit. Rather, antitrust law – as is relevant here – forbids conspiracies to influence prices. *See* Kan. Stat. Ann. § 50-112; Colo. Rev. Stat. § 6-4-104; Mo. Rev. Stat. § 416.031; 79 Okla. Stat. § 203; Wis. Stat. § 133.03; Wyo. Stat. Ann. § 40-4-101. Thus, while the various complaints in this case highlight different factual aspects of petitioners' conspiracy – sometimes focusing on the manipulation of the indices, *see, e.g.*, J.A. 412-13, and sometimes focusing on the eventual sales, *see, e.g.*, *id.* 312-13 – the specific means petitioners used to restrain trade are immaterial.

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contracts there affected jurisdictional rates only "indirectly," Defs.' C.A. Br. 39, respondents replied that "[t]he 'effect' in the present case and the 'effect' in *American Gas* are similarly attenuated, and thus the 'effect' here should similarly be beyond [Section 5(a)]'s reach." Learjet C.A. Reply Br. 7 (internal quotation marks and citation omitted). Finally, respondents renewed this argument during the certiorari stage, *see* Learjet BIO 19-20, thereby preserving their ability, pursuant to this Court's Rule 15.2, to make it now.

Given that petitioners and their *amici* have briefed the question whether the practice at issue has a direct effect on wholesale rates (*see* Petr. Br. 41-43; Amicus Br. of Noble Ams. Energy Solutions 9-13), there is no reason, if this Court finds the question relevant to the proper disposition here, to refrain from addressing the issue. But at the very least, this Court should follow the Solicitor General's advice and allow this issue, if necessary, to "be resolved by the court of appeals on remand." U.S. Br. 20 n.4.

Insofar as respondents allege that petitioners violated state antitrust law, respondents claim simply that petitioners colluded to inflate prices in retail transactions, thus causing respondents to "pa[y] higher prices" than they should have. Petr. Br. 11.

This practice of conspiring to inflate prices in retail transactions does not have a direct effect on wholesale rates. That is because nothing in federal law or any wholesale contract petitioners have introduced in evidence (or of which respondents are otherwise aware) requires sellers to price wholesale transactions the same way they price retail transactions.

Put another way, private lawsuits seeking damages based on state law are a form of "regulation" insofar as they "govern[] conduct and control[] policy" going forward. *Kurns v. R.R. Friction Prods., Corp.*, 132 S. Ct. 1261, 1269 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). Yet if respondents prevail here on the ground that state law forbids conspiring to increase prices in retail transactions, that ruling would not govern any conduct with any effect on wholesale rates. State antitrust law will not prevent gas sellers, if they wish, from reporting false prices to the indices or executing wash trades. Nor will it prevent sellers from pegging wholesale prices to the indices. The only effect of the state-law judgment respondents seek would be to prevent sellers from conspiring to use artificially inflated prices in retail transactions. That holding would have no effect whatsoever on wholesale rates.

B. Even If The "Practice" At Issue Was Really Petitioners' Index Reporting, This Practice Did Not Fall Within FERC's Section 5(a) Authority.

Even if petitioners were correct that the relevant "practice" at issue in this case was somehow index reporting itself, that conduct did not fall within FERC's Section 5(a) authority. This is so because (1) many of the reports at issue concerned sales (or supposed sales) outside of FERC's jurisdiction; and (2) any effect that other reports to the indices had on wholesale rates stemmed only from petitioners' intervening choice to reference index prices in their own wholesale contracts.

1. The NGA authorizes FERC to regulate certain practices of gas companies when such companies are "engaged in" wholesale transactions. 15 U.S.C. § 717(b); *see also id.* § 717a (defining a "[n]atural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale"). But the NGA's grant of federal power does "not apply to any other transportation or sale of natural gas." *Id.* § 717(b). Accordingly, while petitioners call themselves "jurisdictional sellers," *e.g.*, Petr. Br. 11, gas companies that "engage in both jurisdictional and non-jurisdictional sales" cannot be categorically termed "jurisdictional sellers" or "non-jurisdictional sellers." Pet. App. 128a. They are the former when involved in jurisdictional transactions and the latter when involved in non-jurisdictional transactions. Put another way, although Section 5(a) gives FERC the authority to regulate certain practices of gas companies when acting as "jurisdictional sellers," it

could not have given FERC any power during the time period at issue here to regulate the same companies when making (or claiming to make) non-jurisdictional sales.

FERC itself has repeatedly recognized this limitation on its jurisdiction. When instituting the program of blanket marketing certificates, FERC stressed "that an individual company can be engaged in both jurisdictional and nonjurisdictional activities," and FERC acknowledged that it was not claiming authority over "the non-jurisdictional aspects of these marketers' business." Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57,952, 57,957 (Dec. 8, 1992); *accord* J.A. 58-59 (initial district court decision). FERC's regulations also explained that each certificate issued under the program was "of limited jurisdiction which [would] not subject the certificate holder to any other regulation under the Natural Gas Act . . . other than [the provisions concerning 'sales for resale']." Blanket Marketing Certificates, 18 C.F.R. § 284.402(a); *see also* Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, 66,325-26 (Nov. 26, 2003) (acknowledging that "a portion of the market [would] not be subject to these regulations"). Thus, according to FERC's own words and regulations, FERC lacked any jurisdiction over gas companies during the period at issue to the extent they reported supposed prices and volumes for *non-jurisdictional transactions* to the indices.[8]

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[8] The Solicitor General states that FERC issued the Code of Conduct "without limiting [its] prohibitions to contexts

A substantial portion of the reports petitioners made to the indices during the time period at issue involved direct retail or other (real or fictitious) sales "outside of FERC's jurisdiction." *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1035 (9th Cir. 2007); *see also id.* at 1048; J.A. 58-59.[9] Consequently, as the district court initially seemed to recognize (J.A. 55-59), insofar as those reports inflated the indices, respondents' claims arising from those reports cannot be preempted. State law in this context is being wielded to do nothing more than what the Solicitor General says is permissible (*see* U.S. Br. 28 n.6): namely, to hold petitioners liable for misreporting of *non-jurisdictional* sales in order to raise prices in later *retail* sales.

As the district court also initially seemed to recognize (*see* J.A. 51-55), the EPAct of 2005 confirms

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involving jurisdictional sales," U.S. Br. 34-35, but, as shown in the text, any suggestion that the Code reaches beyond reports of jurisdictional sales deviates from FERC's own words at the time. In any event, the plain text of NGA Section 1(b) forbade FERC from asserting authority over reports of non-jurisdictional transactions.

[9] While we know that about 70% of gas consumed during the time period at issue was purchased in direct retail transactions, *see supra* at 5, the record as it currently exists does not reveal precisely what percentage of petitioners' false and misleading reporting *input* involved non-jurisdictional, as opposed to wholesale, transactions. It suffices here to note that "[f]ederal preemption is an affirmative defense upon which the defendants bear the burden of proof," *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007) (quoting *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 745 (7th Cr. 2005)), and petitioners have never shown (nor could they) that all of their reporting involved jurisdictional sales.

that FERC's authority during the time period at issue was limited to reports of jurisdictional sales. According to FERC, this new statute enlarged its authority to regulate "*non*-jurisdictional entities' manipulative reporting about, and wash-trade practices purporting to involve, non-jurisdictional sales when they are used to manipulate wholesale gas rates." U.S. Br. 32 n.7; U.S. Cert. Br. 21-22 (noting this "significant change[] in the regulatory environment"). If FERC had had such authority in 2000-02, Congress would not have needed to enact this statute. *See* Pet. App. 37a-38a; J.A. 55.

The district court, of course, later backed away from its initial analysis. In doing so, it accepted petitioners' argument on reconsideration that "because *any* alleged false price reports [during 2000-2002] were reported to a common index, *all* false reporting affected the jurisdictional rate, regardless of whether the false report itself was linked to a jurisdictional or non-jurisdictional transaction." Pet. App. 129a (emphasis added).

But this reasoning eviscerates the NGA's pre-2005 distinction between jurisdictional and non-jurisdictional sellers. If Section 5(a) were triggered whenever a gas company made a report to an index that was then later used to set a price in a later wholesale transaction, then Section 5(a) would have given FERC authority over all of petitioners' reports regardless of whether they concerned jurisdictional or non-jurisdictional transactions, but also over reports from companies reporting solely non-jurisdictional transactions. After all, the latter reports would have influenced wholesale prices in exactly the same way as petitioners' reports concerning non-jurisdictional

transactions. Yet even FERC has consistently conceded it lacked any authority before 2005 over companies reporting solely "non-jurisdictional transaction[s]." J.A. 53. By the same token, FERC lacked authority over petitioners' reporting practices to the extent they transmitted information concerning non-jurisdictional transactions.

2. To the extent that the index reporting at issue here conveyed information regarding wholesale transactions, the effect this practice had on wholesale rates was still not "direct" – at least in a world in which the inquiry concerning when an effect is "direct" must control not only FERC's regulatory authority under Section 5(a) but also field preemption analysis under the NGA.

a. Because this Court has never held that NGA Section 5(a) preempts a state-law claim whenever the claim implicates a practice that had a direct effect on wholesale rates, no case from this Court sets forth any definition of what would constitute such a "direct effect." Respondents, therefore, turn to other sources of authority for guidance.

The term "direct," when used in legal parlance, means "immediate; proximate" or "without any intervening medium, agency or influence; unconditional." *Black's Law Dictionary* 459 (6th ed. 1990). Accordingly, cases from this Court involving statutes other than the NGA hold that an effect is not direct if an independent, intervening decision maker determines whether the pertinent consequence takes place. For example, when assessing the effect of a foreign practice under the Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 *et seq.*, the Court has explained that a "direct effect" exists only where the

effect "follows as an immediate consequence" of the practice. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (internal quotation marks and citation omitted). Similarly, in determining the meaning of the phrase "directly affect" in the context of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), the Court held that the leasing of lands for potential oil and gas development did not "directly affect" the nearby coastal zone where "further administrative approval" was required before full exploration or development impacting the coastal zone could begin. *Sec'y of the Interior v. California*, 464 U.S. 312, 321 (1984).[10]

Requiring an effect to be unconditional in order to be direct would be consistent with the outcomes in *Schneidewind* and other cases that petitioners maintain establish that FERC always has exclusive authority over any practice with a "direct effect" on wholesale rates. In each of these cases, the state regulation at issue affected wholesale rates inescapably through the laws of economics. *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988) (company capitalization level directly affected the rates it could reasonably charge); *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 92 (1963) (acknowledging the "intricate relationship" between the costs of purchasing gas from various sources and

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[10] Petitioners reference a couple of other cases involving whether state laws have a "significant impact" on matters subject to state control. Petr. Br. 37 n.6. But a "significant impact" is not the same thing as a "direct effect." The word "direct" connotes immediate causation in a way that the word "significant" does not.

the rates it would eventually charge buyers for that gas); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 372-73 (1988) (recognizing that a company's ability to recover "reasonable operating expense costs," which would have otherwise been trapped and unrecoverable as a result of state regulation, directly affected the price it could charge for gas). In none of these cases did the question whether the practice state law was regulating would affect wholesale rates depend entirely on an intervening decision maker.

b. Petitioners argue that manipulating the indices through false or misleading reporting directly affected wholesale rates because "jurisdictional sellers [during the time period at issue] entered into contracts for wholesale transactions that adopted the index rate as the sales price for gas." Petr. Br. 42. This reality establishes at most only an indirect effect.

As petitioners explain, "prices [in the natural gas market] are set by market participants, such as Petitioners and their contracting partners, rather than FERC" or any other binding authority. Petr. Br. 43. That being so, the question whether index manipulation affected wholesale prices during the time period at issue depended entirely on the sellers' voluntary decision making. If they elected to peg wholesale prices to the indices, then manipulating the indices would affect those prices. But if sellers chose not to peg wholesale prices to the indices (or if FERC, as it unquestionably had the power to do, had forbidden them from doing so), then manipulating the indices would have had no effect on wholesale prices.

This kind of wholly contingent situation hardly left wholesale prices dependent on index reporting practices "without any intervening medium, agency or influence." *Black's Law*, *supra*, at 459. In other words, wholesale rates did not fluctuate "as an immediate consequence," *Weltover*, 504 U.S. at 618, of index manipulation. Rather, the question whether wholesale rates were affected by index manipulation depended completely on the sellers' own choices.

Holding that petitioners' index manipulation had a "direct effect" on wholesale rates – and thus that petitioners are immune from state-law liability – would be especially misguided in light of the antitrust allegations here. As proof of their assertion that "jurisdictional sellers entered into contracts for wholesale transactions that adopted the index rate as the sales price for gas," petitioners cite three sets of contracts – all voluntarily entered into *by petitioners themselves*. Petr. Br. 42. What is more, the counterparty in nearly all of these transactions was also a petitioner in this suit, suggesting that many of these transactions were wash trades.[11] Surely

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[11] Petitioners reference a transaction in September 2001 through which "[p]etitioner Duke Energy Trading and Marketing sold 55,000 MMBtu of index-priced wholesale natural gas per day." Petr. Br. 42. This statement, however, omits the fact that the counterparty to this transaction was Reliant Energy, also a petitioner in this suit, and that in the same month Reliant sold the exact same quantity of gas back to Duke Energy. J.A. 641. In addition, nearly 11 million of the 14.5 million MMBtu of wholesale natural gas sold by CMS Marketing Services, Pet. Br. 42, was sold to Dynegy, El Paso, Oneok, and Reliant (all petitioners in this suit), and the remainder was sold to Enron (now defunct) and PanCanadian

petitioners cannot avoid state antitrust liability for a conspiracy designed to inflate retail prices because they further colluded to use the same indices – knowing full well that those indices did not represent true market prices – as price points in select wholesale transactions, even as they continued to use true market prices for other wholesale transactions. *See* J.A. 148-49.

It gets worse. Petitioners' theory also would allow natural gas companies in the future to exempt themselves from virtually any area of state law. If all that mattered to the NGA's field preemptive effect was whether sellers chose to peg prices for wholesale transactions to some outside reference point, then gas companies could render, say, a state's labor or tax laws inapplicable to them simply by pegging

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(known after a 2002 merger as EnCana Corporation, which was named in this litigation as a co-conspirator and was the defendant in the *Gallo* litigation, *see* 715 F.3d at 1030). J.A. 632.

The other transactions not cited by petitioners but included in the record tell the same story. Nine of the ten counterparties submitted by petitioners E-Prime and five of the six submitted by AEP are either named defendants or named co-conspirators, and the remaining counterparty in each case is an affiliate of a named co-conspirator. J.A. 643-44 (tables referred to in this declaration are omitted from the J.A. but were submitted as Exhibit 50 in support of Defs.' Joint Mot. for Summ. J., ECF No. 1882-35 (Dec. 16, 2009)). Eight of the ten counterparties submitted by RRI are either named defendants, named co-conspirators, or affiliates of named co-conspirators. Finally, the counterparties in nine of the fourteen counterparties submitted by Coral fall into one of those same three categories, J.A. 643, and the remainder includes Cook Inlet Energy Supply, an entity FERC found to have engaged in wash trades, J.A. 225.

wholesale prices in their contract to the local minimum wage or tax rate. The idea of drafting contracts to reference such laws may, at first blush, seem fanciful. But if a company could exempt itself from state tax law by agreeing in a contract that the price of gas would be increased if a state raised its taxes, it is hard to think of a reason why a company would not seriously consider doing so.

3. Holding that manipulative reporting practices do not directly affect wholesale rates would be perfectly consistent with FERC's conclusion in the 2003 Code of Conduct that it had the power to prohibit jurisdictional sellers from engaging in such reporting practices. As the Solicitor General notes, Section 7 of the NGA "authorized FERC to attach to [blanket marketing] certificates for jurisdictional sellers 'reasonable terms and conditions as the public convenience and necessity may require.'" U.S. Br. 33 (quoting 15 U.S.C. § 717f(e)). That provision amply supported FERC's actions, and, indeed, FERC cited only Section 7 as its authority for issuing the 2003 Code. *See* 68 Fed. Reg. at 66,323.

To be sure, when denying a petition for rehearing respecting the Code of Conduct, FERC referenced not only Section 7 but also Section 5. *See Order Denying Rehearing of Blanket Sales Certificates Order*, 107 F.E.R.C. 61,174, 61,690 (May 19, 2004). But FERC never determined when issuing this amendment to its blanket marketing certificates that manipulative index reporting had a "direct effect" on wholesale rates. Absent such a determination, FERC cannot be taken to have applied its expertise to conclude that any such effect existed here. *See, e.g., Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660

(D.C. Cir. 2011) (courts may defer to an agency's interpretation of a statute "only if the agency has offered a reasoned explanation for why it chose that interpretation"). And the question whether FERC has authority under Section 5 to regulate index reporting practices is now moot in any event. In the EPAct of 2005, Congress enlarged FERC's authority to forbid gas companies from using any manipulative or deceptive device "directly or indirectly . . . in connection with" any jurisdictional sale of natural gas. 15 U.S.C. § 717c-1. That statute gives FERC, on a prospective basis, all of the authority that it is fighting for here.

Finally, no matter what the scope of FERC's Section 5(a) authority in 2000-02 might have been, it is worth noting that the Solicitor General does not seek any claim to *Chevron* deference on the ultimate issue in this case: whether the NGA field preempts all state claims concerning practices that directly affect wholesale prices. Nor could the Solicitor General make any such claim. FERC has never taken a regulatory position on that issue. And *Chevron* should not apply in a preemption case "if an agency does not speak to the question of pre-emption." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985).

* * *

In the end, the Government has nothing to fear from an affirmance here. FERC presumably had the authority to take all of the actions it took in the wake of the index manipulation scandal, and FERC has a full set of tools going forward to police similar conduct. The only issue here is preemption. And because the NGA reserves to the states the authority

to regulate retail transactions and to apply their traditional antitrust law to gas companies, there is no preemption. Any other outcome would distort a statute meant to fill a regulatory gap into one that usurps rather than complements long-standing state authority. Congress would never have imagined, much less condoned, such a result.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey L. Fisher
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jennifer Gille Bacon
Counsel of Record
William E. Quirk
Gregory M. Bentz
Anthony Bonuchi
Andrew J. Ennis
POLSINELLI PC
900 W. 48th Place
Kansas City, MO 64112
(816) 753-1000
jbacon@polsinelli.com

November 21, 2014

RESPONDENT'S BRIEF

No. 13-271

IN THE

Supreme Court of the United States

ONEOK, INC., ET AL., PETITIONERS,

v.

LEARJET, INC., ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE WISCONSIN RESPONDENTS

ROBERT L. GEGIOS*
RYAN M. BILLINGS
STEPHEN D. R. TAYLOR
MELINDA A. BIALZIK
AMY IRENE WASHBURN
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110
rgegios@kmksc.com

Counsel for
The Wisconsin Respondents

**Counsel of Record*

QUESTION PRESENTED

Whether the Natural Gas Act, as it existed during the relevant time period, before the Act was materially amended in 2005, preempts state antitrust claims based on a conspiracy to inflate prices in retail natural gas sales transactions explicitly reserved to state regulation by the Act.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Wisconsin Respondents disclose their corporate affiliations as follows:

Arandell Corporation has no parent and no publicly-held corporation owns 10% or more of its stock.

ATI Ladish LLC, f/k/a Ladish Company, Inc., is a wholly-owned subsidiary of Allegheny Technologies Incorporated. No publicly-held corporation owns 10% or more of the stock of Allegheny Technologies Incorporated, which is publicly traded on the New York Stock Exchange.

Briggs & Stratton Corporation has no parent and is publicly traded on the New York Stock Exchange. No other publicly-held corporation owns 10% or more of its stock.

Carthage College has no parent and no publicly-held corporation owns 10% or more of its stock.

Merrick's, Inc., is a wholly-owned subsidiary of Merrick Animal Nutrition, Inc. No publicly-held corporation owns 10% or more of the stock of Merrick's, Inc., or Merrick Animal Nutrition, Inc.

NewPage Wisconsin System Inc., is a wholly-owned subsidiary of NewPage Consolidated Papers Inc. No publicly-held corporation owns 10% or more of the stock of NewPage Wisconsin System Inc., or NewPage Consolidated Papers Inc.

Sargento Foods Inc. has no parent and no publicly-held corporation owns 10% or more of its stock.

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BRIEF FOR THE WISCONSIN RESPONDENTS

The Wisconsin Respondents[1] respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

STATUTES INVOLVED

Wisconsin Statutes Section 133.01 provides:

> The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

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[1] "Wisconsin Respondents" refers to the plaintiffs in the Wisconsin actions, as described below.

Wisconsin Statues Section 133.03 provides, in relevant part:

> (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal....

Wisconsin Statutes Section 133.14 provides:

> All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by s. 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

Wisconsin Statutes Section 133.18 provides, in relevant part:

> (1)(a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including

> reasonable attorney fees. Any recovery of treble damages shall, after trebling, be reduced by any payments actually recovered under s. 133.14 for the same injury.
>
> ...

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides:

> (b) Transactions to which provisions of chapter applicable
>
> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a) (emphasis in original), provides:

> (a) Decreases in rates
> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company,

shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

INTRODUCTION

The matter before this Court involves Wisconsin businesses who were victims of petitioners' conspiracy that successfully inflated the retail price of natural gas in Wisconsin.

Petitioners, searching for any means of avoiding liability for their wrongdoing, ask the Court to adopt a preemption test that would not only immunize them from liability, but would also fundamentally contort bedrock principles of federalism, as well as the dual-regulatory system of the Natural Gas Act ("NGA").

The issue before this Court is whether known market manipulators should be able to avoid antitrust liability for voluntary, collusive activities that successfully caused rampant inflation of retail natural gas prices in Wisconsin. The ignoble means by which petitioners would achieve this end would overturn express Congressional restrictions on the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), an agency that lacked the purpose and ability to police and redress such behavior.

Petitioners' theory casts aside a century of public policy and practice, explicit and codified Congressional intent, the principles of statutory interpretation and federalism, the rights of the State of Wisconsin to enjoy a free and uncorrupted economy and the victims: Wisconsin businesses at whose expense the Petitioners lined their pockets.

STATEMENT OF THE CASE

A. Factual Background.

Each year, Wisconsin businesses and residents consume up to $3.5 billion worth of natural gas, amounting to almost two percent of the state's gross domestic product. J.A. 517. Natural gas is the primary energy source for many industries and businesses in Wisconsin, including metal working, food processing, brewing and dairy processing. J.A. 243. It is used heavily as heating fuel, and generates a substantial percentage of the electricity consumed in the state. J.A. 242-243. Wisconsin is entirely dependent on producers in other states to provide the needed gas. J.A. 243. Wisconsin was one of the pioneers of natural gas regulation and has regulated sales of natural gas for more than 100 years. Muchow, D. & W. Mogel, eds., Energy Law and Transactions § 50.76[a] (New York: Matthew Bender, 2014) ("*Energy Law & Transactions*") ("Wisconsin and New York ushered in the modern era [of state utility regulation] in 1907 with comprehensive enabling statutes").

Between 2000 and 2002, the retail price of natural gas in Wisconsin rose dramatically. J.A. 312. For instance, the city-gate price for natural gas in Wisconsin increased from $2.94 per thousand cubic feet in January 2000, to a price of $9.92 per thousand cubic feet in January 2001. J.A. 243. On average, prices during this period more than doubled. J.A. 312. That dramatic spike was the result of a conspiracy among petitioners. Pet. App. 12a-15a. The victims of the conspiracy include industrial and commercial users of natural gas who consumed it. Pet. App. 19a-23a. These Wisconsin businesses were

injured by the exorbitantly high prices paid for natural gas as a result of petitioners' wrongful acts. *Id.* State of Wisconsin Amicus Curiae Brief in Support of Plaintiff-Appellants, Dkt No. 26-1, at 3 (Dec. 7, 2011) ("*Wis. Amicus*") ("The financial impact of the alleged price manipulation on Wisconsin natural gas purchases is large. The Energy Information Agency estimates that during the relevant time period, Wisconsin industrial and commercial users of natural gas spent $3.7 billion, including approximately $1.9 billion for natural gas at unregulated rates").

To achieve such a substantial artificial increase in natural gas prices, it was necessary for petitioners to act in concert, as, individually, they lacked market power. *See Regulations Governing Blanket Marketer Sales Certificates*, 57 Fed. Reg. 57,952-01, 57,957-58 (1992) (explaining that no single company had market power, a prerequisite condition for FERC's issuance of blanket certificates). Thus, petitioners "made arrangements, contracts, and agreements, and entered into a combination and conspiracy between the defendants which prevented full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas." J.A. 253.

The mechanisms by which this conspiracy was carried out are the subject of ongoing discovery, but the Wisconsin Respondents have alleged a host of activities in which petitioners engaged to achieve their conspiratorial aim of inflating retail prices, including:

- directly coming to pricing agreements (*See, e.g.*, *Arandell-Wisconsin* Complaint, J.A. 299);
- sharing pricing information (J.A. 299);
- engaging in strategic marketing policies and strategies designed to inflate prices (J.A. 251);
- engaging in continuous communications regarding spot prices of natural gas and natural gas futures prices to give the conspirators privileged access to market information (J.A. 300);
- planning and executing schemes to increase volatility in spot prices (J.A. 300);
- agreeing to coordinate the withholding of information from the market (J.A. 278);
- voluntarily submitting false or misleading price and volume information to private indices and other sources of market information (J.A. 284);
- coordinating their voluntary disclosure of fabricated trades to private publishers of price indices (J.A. 255);
- engaging in sham transactions involving simultaneous, offsetting purchases and sales of natural gas at the same volume and price, with no contemplation of product or money changing hands (sometimes known as "wash trades") (J.A. 268); and
- agreeing to pretend that the false market perceptions they created were real in interactions with non-conspirators (J.A. 302).

Petitioners have denied engaging in these activities, so the methods by which petitioners achieved their conspiratorial objective will ultimately be determined at trial.

The cumulative effects of petitioners' misconduct triggered a historic crisis in the energy markets. *See, e.g.*, 151 Cong. Rec. S. 9344 (July 29, 2005) (containing the comments of Senator Cantwell, describing the unethical manipulation of the natural gas market between 2000-2002 as "disastrous"). Public outcry led to an investigation by FERC. Subsequent investigations by the United States Commodity Futures Trading Commission and the Department of Justice led to multi-million dollar fines for the petitioner entities and related companies, as well as guilty pleas, fines and jail time for a number of individual traders who participated in the conspiracy. *See, e.g.*, J.A. 289, 298. However, fourteen years later, the Wisconsin businesses who paid exorbitant prices for natural gas to operate their businesses have received no compensation for their injuries.

B. Procedural History.

The Wisconsin Respondents brought three putative class actions between 2006 and 2009 pursuant to Wisconsin antitrust laws: *Arandell-Wisconsin*,[2] *NewPage*[3] and *Arandell-Michigan*.[4] These actions seek recovery for:

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[2] Ninth Circuit Appeal No: 11-16869; Dist. Ct. Case No.: CV-S-07-1019-PMP (PAL) (D. Nev.).

[3] Ninth Circuit Appeal No: 11-16876; Dist. Ct. Case No.: CV-S-09-915-PMP (PAL) (D. Nev.).

> Industrial and commercial purchasers of natural gas for their own use or consumption between January 1, 2000 and October 31, 2002 (the "Relevant Time Period"), and which gas was used or consumed by them in Wisconsin.

See, e.g., J.A. 242. In addition to limiting their claims to purchases of natural gas for consumption, plaintiffs have alleged that they "do *not* seek to recover damages for any sales the price of which is set via a regulatory procedure by [FERC]." J.A. 246 (emphasis added). Because the initial actions were filed in state court, raising state antitrust claims, and because federal and state antitrust laws are coterminous and complementary, it was unnecessary to bring an action in federal court pleading both state and federal antitrust claims.

Petitioners removed all three actions under 28 U.S.C. § 1453, and the actions were consolidated for pretrial purposes with other cases in MDL-1566, *In re Western States Wholesale Natural Gas Antitrust Litigation*.

Among many other procedural motions, petitioners moved, in other cases in the MDL, but not in any of the Wisconsin Respondents' actions, for summary judgment on the basis of preemption under the NGA, 15 U.S.C. § 717, *et seq.* The district court denied these motions in the other consolidated actions on May 14, 2008. J.A. 61-62. At that time, the statute of limitations for the Wisconsin Respondents' claims had not yet run, and, given the district court's conclusion that similar state antitrust claims were

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[4] Ninth Circuit Appeal No: 11-16880; Dist. Ct. Case No.: 2:09-CV-1103-PMP (PAL) (D. Nev.).

not preempted by the NGA, the Wisconsin Respondents did not seek to amend their complaints to add federal claims.

After one and a half years of substantial litigation on the merits, on November 2, 2009, the district court granted petitioners' motion for reconsideration of its May 18, 2008, Order denying summary judgment on preemption grounds. Pet. App. 40a, 136a. Because no such motion had been brought in any of the Wisconsin Respondents' actions, the Wisconsin Respondents had no opportunity to participate in this decision or appeal its holding. *See id.* Despite this, petitioners used the district court's reconsideration of its earlier decision in the other actions to file new preemption motions against the Wisconsin Respondents on December 16, 2009.

On December 15, 2009, as a result of the district court's severely delayed reversal of its earlier holding, the Wisconsin Respondents filed a motion for leave to file an amended complaint, adding federal claims. On October 29, 2010, the district court denied the Wisconsin Respondents' motion. Pet. App. 39a. On July 18, 2011, the district court granted summary judgment to petitioners on preemption grounds in all pending cases in the MDL. Although the district court had concluded that Section 1(b) of the NGA denied FERC jurisdiction over the retail sales in question here, the district court concluded that FERC had such jurisdiction on the basis of its authority to regulate practices in Section 5(a). Pet. App. 114a. The district court entered an amended final judgment on August 18, 2011. Pet. App. 119a-121a.

Respondents appealed, and the United States Court of Appeals for the Ninth Circuit reversed the

district court's judgment with respect to preemption on April 10, 2013. Pet. App. at 63a. The Ninth Circuit offered a careful and comprehensive analysis of why FERC's jurisdiction over the practices of natural gas companies under Section 5(a) of the NGA does not bar state antitrust claims challenging retail prices. Pet. App. 23a-39a. The court of appeals did not address the unfair prejudice to the Wisconsin Respondents resulting from the district court's delayed reversal of its holding in the other consolidated cases.

On August 26, 2013, petitioners brought before this Court a petition for writ of *certiorari*. On July 1, 2014, the Court granted *certiorari* review. On September 25, 2014, *amicus* briefs in support of the petition were filed by the Independent Petroleum Association of America (IPAA),[5] Interstate Natural Gas Association of America (INGAA),[6] and Natural Gas Supply Association (NGSA)[7] (combined brief

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[5] The IPAA's membership list is not publicly available; however, its website allows corporate members to post available jobs, and lists jobs posted by the parent of the CMS and El Paso defendant groups.

[6] INGAA's foundation members include the parent of the CMS and El Paso defendant groups and Williams Gas Pipeline (affiliate of petitioner The Williams Companies, Inc.); its members include petitioner ONEOK, Inc.; and Sempra US Gas & Power (n/k/a Noble Americas Gas & Power; *see* n.10, *infra*). *See* INGAA Foundation Members and Members, *available at* http://www.ingaa.org/common/default.aspx?id=32 (listing the foundation members) and http://www.ingaa.org/Members/963.aspx (listing members) (last visited Nov. 19, 2014).

[7] The NGSA's membership list is not publicly available, but Frans Everts, President of Shell Energy North America (U.S.), L.P., successor to petitioner Coral Energy, is the organization's Secretary-Treasurer. *See* Natural Gas Supply Association

filed), Noble Americas Energy Solutions, Noble Americas Corporation, and Noble Americas Gas & Power[8] (combined brief filed), and the Washington Legal Foundation.[9] The fellow-traveler *amici* set forth exactly the arguments one would expect them to make, parroting petitioners' arguments.

Secretary-Treasurer, *available at:* http://www.ngsa.org/about-ngsa/secretary-treasurer/ (last visited Nov. 19, 2014).

[8] According to its own "Linked-In" webpage, Noble Americas Energy Solutions LLC is the successor-in-interest to Sempra Energy Solutions. *See:* http://www.linkedin.com/company/noble-americas-energy-solutions-lc?trk=top_nav_home (last visited Nov. 19, 2014)). Although not a named defendant here, *Sempra Energy is listed in the Wisconsin Respondents' Complaints as a co-conspirator. See, e.g.* J.A. 488. According to documents that Sempra itself filed with the SEC on May 2, 2008, on January 4, 2008, Sempra settled thirteen antitrust actions that had been coordinated against it in San Diego Superior Court, related to Sempra's unlawful manipulation. *See:* http://www.wikinvest.com/stock/SEMPRA_ENERGY_(SRE)/Filing/10-Q/2008/10-Q/D766874 (last visited Nov. 19, 2014).

[9] The Members of the Washington Legal Foundation's Legal Policy Advisory Board include Coleen Klasmeier of Sidley Austin LLP, whose firm serves as counsel for the CMS petitioners, and Rob McKenna of Orrick, Herrington & Sutcliffe LLP, whose firm serves as counsel for the AEP petitioners. *See* Washington Legal Foundation, Legal Policy Advisory Board, *available at:* http://www.wlf.org/org/legalpolicy.asp (last visited Nov. 19, 2014). The Washington Legal Foundation's "Speakers List" (found in its annual report on its website) include Thomas C. Goldstein, counsel for INGA, IPAA, and NGSA; Neal Katyal, petitioners' counsel of record, as well as Janet L. McDavid, also of Hogan Lovells LLP, and several additional attorneys from the Sidley Austin firm (representing CMS). *See id.*

SUMMARY OF THE ARGUMENT

I. The NGA does not preempt the Wisconsin Respondents' state antitrust claims. Federal and state antitrust claims have served in concert with the NGA since its inception. No court has held that FERC requires implicit preemption of antitrust claims to accomplish its core regulatory goals. In fact, antitrust regulation has become more vital to the deregulated natural gas markets envisioned by Congress.

Petitioners mischaracterize the Wisconsin Respondents' claims as targeting the individual practices of natural gas companies in voluntarily submitting false sales statistics to private indices of market information. That is manifestly incorrect. The Wisconsin Respondents' antitrust lawsuits challenge petitioners' conspiracy in restraint of trade, which succeeded in exorbitantly increasing prices the Wisconsin Respondents paid for gas they consumed in the course of their business operations. Such claims present no impermissible overlap with any FERC authority.

II. The NGA does not preempt the Wisconsin Respondents' challenges to the retail prices of natural gas. In enacting the NGA, Congress deliberately set out a dual-regulatory system of federal and state authority that explicitly preserved the powers of the states present at the time of enactment. Congress has never wavered from this regulatory scheme, and the Court has carefully protected it in an unbroken stream of cases spanning more than seven decades.

Congress' dual-regulatory system reserved to the states the plenary authority they had applied effectively to regulate retail sales since natural gas became a viable commercial commodity, more than forty years before the NGA. Not only, therefore, do the Wisconsin Respondents' actions not threaten FERC's authority, they reside in an area in which FERC may not regulate, pursuant to the deliberate intent of Congress. To dismantle the dual-regulatory system embodied in the NGA in the name of granting individual immunity to a group of admitted wrongdoers would be perverse.

III. *Chevron* deference is inapplicable as asserted here. Despite the arguments of the Solicitor General, FERC's recently revised interpretation of its authority under the NGA, as it existed prior to the Energy Policy Act of 2005 ("EPAct"), is entitled to no deference or consideration in this Court's preemption analysis. Since passage of the EPAct, FERC has become embroiled in multiple lawsuits testing the reach of its new authority. FERC's enlarged authority post-EPAct, however, is not implicated by the matter before this Court.

IV. A heavy presumption against preemption should be applied to petitioners' novel theory. To protect the rights of the states to police matters within their own borders, this Court has consistently applied presumptions that Congress does not intend to intrude upon historic state authority absent explicit evidence to the contrary. There is no such evidence here, and petitioners' arguments should be viewed with heightened scrutiny and significant skepticism.

V. Finally, the novel test petitioners urge this Court to adopt would be unworkable and disastrous. Petitioners' "direct effects" test is unprecedented. No such radical and all-consuming usurpation of state authority or disregard of Congressional language has ever been recognized by this Court. To the contrary, this Frankenstein's monster is stitched together from a carefully selected handful of this Court's opinions that are premised on very different fact patterns.

Petitioners' test, if adopted, would eviscerate state regulation and fundamentally alter the balance between federal and state authority. It would allow known wrongdoers like petitioners to game agency regulatory authority in order to achieve immunity from state laws. Such a result has no basis in law, precedent or policy, and must not succeed.

ARGUMENT

I. THE NGA DOES NOT PREEMPT THE WISCONSIN RESPONDENTS' ANTITRUST CLAIMS.

A. Antitrust Laws Predate the Natural Gas Act, Existing Comfortably Alongside the NGA Since its Inception.

The Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.*, was passed in 1890. 26 Stat. 209. At that time, 21 states had enacted their own antitrust laws.[10] In 1893, Wisconsin passed a nearly identical law. 1893 Wis. Act 219; Stats. 1898 § 1747e; *see also Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 150 (Wis. 2005) (explaining that the similarities between the

[10] *California v. ARC America Corp.*, 490 U.S. 93, 101 n.4 (1989).

Sherman Act and Wisconsin's antitrust laws have led courts and commentators to refer to Wisconsin's antitrust laws as the "Little Sherman Act").

Congress intended the Sherman Act to apply only to interstate antitrust violations, while the state antitrust acts would govern intrastate cases. *See* 21 Cong. Rec. S. 2456 (Mar. 21, 1890) (containing the remarks of the Sherman Act's sponsor, Senator John Sherman of Ohio, that "Each state can and does prevent and control combinations within the limit of the state. This we do not propose to interfere with"). The Sherman Act has never been interpreted as displacing state antitrust laws. *See, e.g., ARC America Corp.*, 490 U.S. at 102.

For more than 120 years, Wisconsin's Little Sherman Act has existed comfortably alongside federal antitrust law. Moreover, Wisconsin, like many other states, follows federal court interpretations of the Sherman Act in construing the Little Sherman Act.[11]

Congress was aware of such antitrust laws when it passed the NGA in 1938, and intended no disturbance of their reach. This Court has respected Congress' intent by holding that in interpreting the relationship between the federal antitrust laws and the NGA, "the rule is to give effect to both if possible." *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962); *Otter Tail Power Co. v. United*

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[11] *See, e.g., Prentice v. Title Ins. Co. of Minn.*, 176 Wis. 2d 714, 724, 500 N.W.2d 658 (1993) (collecting cases). Federal courts have also interpreted the Little Sherman Act in accordance with federal precedent. *See, e.g., Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994, 998 (7th Cir. 1997).

States, 410 U.S. 366, 374 (1973) (explaining that regulation under the NGA does not insulate companies from federal antitrust laws, and stressing that "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws"); *see also City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 398-99 (1978) (explaining that antitrust laws will not be displaced by a regulatory regime unless the antitrust and regulatory provisions are "plainly repugnant").

Accordingly, no court has held that the NGA preempts the Sherman Act or the companion state antitrust acts. To the contrary, this Court has held that FERC must defer to the decisions of courts on antitrust issues delegated to the courts by Congress in the federal antitrust laws. *City of Lafayette*, 435 U.S. at 485, 490 ("there is no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to [FERC].... Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency... lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the [FERC]"); *see also* Pet. Br. p. 32 (conceding that identical Sherman Act claims would not be preempted).

The courts of appeal have applied the same reasoning with respect to state antitrust laws. In *State of Ill., ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479-80 (7th Cir. 1991), the court rejected a pipeline's claim that Illinois antitrust actions were preempted by federal regulation of the natural gas industry. Citing *California v. Federal Power Commission*, the court reasoned:

> [F]ederal gas regulation does not immunize natural gas companies from application of the federal antitrust laws. When state antitrust law only mirrors federal antitrust law, there is no reason to conclude that Congress intended to preempt the state law.... the Illinois Antitrust Act...[was] modeled [on] the Sherman Act... and Illinois law provides that its courts should use the construction of federal antitrust law by federal courts to guide their construction of those state antitrust laws....[12]

The reasoning of the court of appeals is soundly rooted in the fundamental economic policies underpinning antitrust actions and the fact that state antitrust actions have long been understood to be part of the states' historic regulation. *ARC America Corp.*, 490 U.S. at 101 ("Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States" (internal footnote omitted)); *Wis. Amicus*, p. 6 (explaining that Wisconsin's historical police power includes antitrust enforcement).

The Solicitor General conceded at the *certiorari* stage, as the petitioners did in the lower courts and in their brief before this Court, that "FERC's

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[12] Petitioners argue that Wisconsin's full consideration statute would impose additional burdens on natural gas companies beyond their Sherman Act liability. However, there is no basis to conclude that a full consideration recovery would be more onerous than treble damages. With a doubling of natural gas prices during the relevant time period, it is quite possible that full consideration might be the lesser recovery. *See, e.g.*, J.A. 312.

jurisdiction over the manipulation of the indices to the exclusion of the States does not mean that federal antitrust laws would be displaced to the extent they apply." U.S. Cert. Br. p. 17; Pet. Br. p. 32. In its *amicus* brief, the Solicitor General points out that the Court has not opined on whether the filed-rate doctrine preempts federal antitrust or state breach of contract actions. U.S. Br. pp. 24-25. However, the filed-rate doctrine is not implicated here, as FERC has already concluded that the petitioners' manipulations violated their blanket certificates, and thus petitioners' sales under these certificates were not FERC-approved market rates. Petitioners have accordingly raised no filed-rate defense.

There is no basis in history or precedent for the premise that Wisconsin's antitrust law poses any danger to FERC. Antitrust actions, be they federal or state, target anticompetitive collusion, which is neither within FERC's purview nor a threat to its regulatory purpose. In fact, general antitrust laws are the cornerstone to establishing a fair market in which prices are set by competitive forces. *City of Lafayette*, 435 U.S. at 398; *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 529 N.W.2d 905, 909 (Wis. 1995) ("The importance of the antitrust laws in preventing monopolies and encouraging competition, the fundamental economic policy of this state, is directly reflected in the statement of legislative intent in [the Wisconsin Statutes and] case law" (internal quotation omitted).[13]

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[13] *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as

Indeed, antitrust laws protect the free markets on which FERC's recent deregulation polices are based. *See Simon v. KeySpan Corp.*, 694 F.3d 196, 206 (2d Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 1998 (2013) ("antitrust remedies become more necessary as markets become increasingly deregulated"); *see also Energy Law & Transactions*, § 101 ("Economic regulation of the energy industries derives from two basic sources: first, direct regulation through administrative agencies; second, indirect regulation under the antitrust laws. These two forms of regulation have a common objective—to protect the public interest by achieving the most efficient allocation of resources possible, and should be assumed not to conflict" (internal quotation omitted)).

B. The Wisconsin Respondents' Antitrust Claims Do Not Require a Finding As to Reporting Practices to Prevail.

The Wisconsin Respondents allege violations of Wisconsin's antitrust laws. Wis. Stat. §§ 133.14 and 133.18. The required elements of these claims mirror Section 1 of the Sherman Act, namely:

(1) Defendants entered into a conspiracy or collusive agreement;
(2) In restraint of trade;
(3) Causing injury to the plaintiffs.

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important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster").

Murray v. McGarigle, 34 N.W. 522, 529 (Wis. 1887); *Meyers v. Bayer AG,* 735 N.W.2d 448, 454 (Wis. 2007). The purposes of these generally applicable prohibitions have been laid out expressly by the Wisconsin legislature, which took the unusual act of making this intent part of Wisconsin's statutory law. Wis. Stat. § 133.01 provides:

> The intent of this chapter is to safeguard the public [against monopolies and] encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition... to make competition the fundamental economic policy of this state....

There can be no doubt that Wisconsin's antitrust laws target anticompetitive behavior for the purpose of promoting competition. Such laws of general applicability are not targeted at any specific industry, but rather at anticompetitive collusion generally.

The Wisconsin Respondents are industrial and commercial purchasers of natural gas, who purchased such gas for consumption (*i.e.,* at retail) in the course of their business operations. J.A. 242; J.A. 427-428; J.A. 512-513. The Wisconsin Respondents allege that the petitioners "conspired to restrain trade or commerce relating to natural gas, and they received or benefitted from the payments made by the plaintiffs pursuant to the plaintiffs' natural gas purchase agreements.... result[ing] in the plaintiffs paying inflated prices for natural gas.... higher prices for natural gas than [plaintiffs] would have paid if the defendants' conspiracy had not existed." *See, e.g.,* J.A. 311-312.

The obvious purpose of these claims is to redress injury to purchasers who overpaid for natural gas due to the petitioners' collusive agreement in restraint of trade. This is a classic antitrust case of the kind that has coexisted with the NGA since its inception.

Ignoring this, petitioners seek to recast the Wisconsin Respondents' antitrust claims as centering on individual reporting practices of natural gas companies. This mischaracterization is demonstrably incorrect, as individual companies' voluntary submission of false sales information to private indices is neither an element of, nor a necessary or sufficient factual predicate to establish, the Wisconsin Respondents' claims. For instance, a jury could find in the Wisconsin Respondents' favor even if it found that there was no false reporting, but that petitioners' conspiracy manifested in a backroom agreement to fix prices. *See* J.A. 299 (alleging such agreements). Conversely, a jury could find that petitioners individually engaged in false reporting, but still find in petitioners' favor, if the jury believed that the petitioners acted unilaterally or without the requisite collusive intent, that any agreements reached were not anticompetitive or that they did not damage the Wisconsin Respondents.

It is simply false to argue that the Wisconsin Respondents' claims merely concern individual natural gas companies' reporting practices.[14] Any

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[14] The district court erroneously believed that false reporting practices were a necessary aspect of the Wisconsin Respondent's legal claims. Pet. App. 115a. This demonstrably incorrect conclusion of law naturally influenced its holding. To be clear, the Wisconsin Respondents believe that false reporting is a notable—but not the sole—mechanism by which petitioners

assertion that the Wisconsin Respondents' claims, or the statutes upon which they arise, are not centered on collusion to raise retail prices, is inaccurate.

C. The NGA Does Not Implicitly Preempt Antitrust Laws.

Despite petitioners' assertion to the contrary (Pet. Br. p. 32), petitioners' logic would suggest that the general antitrust laws must be displaced by FERC's specific regulatory authority. Under extreme circumstances, an agency's regulatory authority may implicitly preempt antitrust laws. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 (1976) (explaining that implied preemption of the antitrust laws will be found only when "the relevant aspect of the agency's jurisdiction must be sufficiently central to the purposes of the enabling statute so that implied repeal of the antitrust laws is necessary to make the (regulatory scheme) work" (internal quotation omitted)); *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162 (1922).

A conclusion of implied preemption must be based on a clear act of Congress, and exemptions against antitrust liability are strictly construed. *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. Nat'l Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) ("Repeal by implication will be invoked only where there is a 'plain repugnancy' between the antitrust and regulatory provisions"); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 351 (1963). These extreme

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accomplished their conspiratorial aim, but no fact has been found as to that issue, nor is such a finding necessary for the Wisconsin Respondents to recover.

circumstances are not present here. *Cf. Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007) (finding antitrust preemption due to the "SEC's comprehensive authority to regulate IPO underwriting syndicates, its active and ongoing exercise of that authority, and the undisputed need for joint IPO underwriter activity").

FERC had no power to prosecute natural gas companies in group settings during the relevant time period. *California Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 400 (D.C. Cir. 2004) (Before the EPAct, FERC could only apply its Section 5(a) authority over practices of individual natural gas companies after it held a hearing and determined that a rate was "unjust, unreasonable, unduly discriminatory or preferential"). Even post-EPAct, FERC lacks punitive measures geared towards conspiratorial behavior.[15] *See* Testimony of Norman C. Bay, Director, Office of Enforcement, FERC, Before the Committee on Banking Financial Institutions and Consumer Protection Subcommittee, United States Senate, January 15, 2014 (summarizing FERC's enforcement powers post-EPAct) ("Bay Test.").[16]

Moreover, FERC's ability to police market manipulation, even post-EPAct, is limited by the authority of other regulators. *Hunter v. F.E.R.C.*, 711 F.3d 155, 160 (D.C. Cir. 2013) (holding that FERC lacks jurisdiction to charge market manipulators of

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[15] If only a single entity had voluntarily submitted false sales information to a private index, no antitrust action would arise. Without market power, market manipulation inherently required multiple participants.

[16] *Available at:* http://www.ferc.gov/CalendarFiles/20140115143216-Bay-testimony-01-15-2014.pdf (last visited Nov. 19, 2014).

natural gas futures contracts, and that the CFTC has exclusive jurisdiction);[17] *Energy Law & Transactions*, § 50.04[2][f] (describing *Hunter* as the "first fully-litigated proceeding involving the Commission's newly enhanced [post-EPAct] enforcement authority" and noting that "the precise scope of [FERC's] enforcement authority is still evolving").

In addition, FERC has no authority (pre- or post-EPAct) to provide relief to the victims of antitrust conspiracies. Indeed, FERC has openly admitted that it is not an enforcer of the Sherman Act. *Cities of Anaheim, Riverside, Banning Colton & Azusa, Ca. v. S. California Edison Co.*, No. CV 78-810 MRP, 1990 WL 209261, at *12 (C.D. Cal. Oct. 22, 1990), *aff'd sub nom.*, *City of Anaheim v. S. California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992) ("FERC itself stated, it does not engage in comprehensive antitrust proceedings" (internal quotation omitted)).

Courts have repeatedly held that FERC is neither tasked with nor competent to enforce the antitrust laws. *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) ("Enforcing the antitrust laws is not the

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[17] Indeed, post-EPAct, the Department of Justice has successfully pursued wholesale sellers for violation of the Sherman Act even in cases where FERC has determined no market manipulation has occurred. FERC Enforcement Staff Report, Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market, pp. 17, 22 (Feb. 28, 2008) (concluding that an electricity wholesaler did not engage in market manipulation); *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 635-638, 643 (S.D.N.Y. 2011) (approving a DOJ settlement with the electricity wholesaler requiring disgorgement of $12 million for violation of the antitrust laws, founded on the same behavior FERC determined did not constitute market manipulation).

FERC's paramount objective, and the only remedy the FERC can grant is to reduce the wholesale price to the lower end of the zone of reasonableness" (internal quotation marks omitted)); *see also id.* (determining that antitrust laws complement and do not interfere with either FERC or state utility regulation, and explaining "neither the FERC nor the [the state utility regulator] has plenary authority over the interaction of wholesale and retail rates, because each commission can affect only one category of those rates. Thus, neither an award of antitrust damages nor the granting of properly conditioned injunctive relief for the price squeeze would interfere with either commission's regulatory authority").

There is no ground for arguing that FERC has regulatory authority "to supervise [antitrust violations]" or "evidence that [FERC] exercises that authority," much less support for any argument that FERC's authority displaces antitrust law. *Credit Suisse*, 551 U.S. at 275-76.

II. THE NGA DOES NOT PREEMPT THE WISCONSIN RESPONDENTS' CHALLENGES TO RETAIL PRICES OF NATURAL GAS.

It is enough that the court of appeals should be affirmed on the basis that the Wisconsin Respondents' state antitrust claims are not preempted by the NGA. Additionally, the decision below should be affirmed on the independent ground that, to the extent the claims at issue constitute natural gas regulation, the Wisconsin Respondents' challenges to the retail sales at issue are firmly on the side of state regulation beyond FERC's reach. They are therefore not preempted by federal law under any circumstance.

A. The NGA Originated in the Historical Backdrop of a Strict Interstate/Intrastate Division Established in the *Attleboro* Line of Cases.

Natural gas became a fuel with broad application in 1855 with the invention of the atmospheric burner by Robert Wilhelm von Bunsen. *Energy Law & Transactions*, § 50.02[1][a]. At that time, natural gas was predominantly manufactured from coal and delivered locally within the same municipality in which it was produced.[18] Local governments regulated the rates charged by passing laws preventing abuse of market power by producers of natural gas.[19] *See also Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States").

The advent of interstate pipeline technologies changed the nature of the industry and the manner of its regulation. Schwartz, *supra* n.19, at 558. Between 1911 and 1928, several states attempted to regulate interstate natural gas pipelines, which at the time were unregulated by the federal government. *History of Regulation, supra* n.18. The federal and state governments operated in separate, mutually exclusive spheres of influence. Not surprisingly, the states' attempt to regulate

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[18] Natural Gas Supply Ass'n, *Natural Gas Regulations: History of Regulation, available at*: http://www.naturalgas.org/regulation/history.asp (an *amicus* here) (last visited Nov. 19, 2014).

[19] *Id.*; *see also* David Schwartz, *The Natural Gas Industry: Lessons for the Future of the Carbon Dioxide Capture and Storage Industry*, 19 Stan. L. & Pol'y Rev. 550, 557-58 (2008).

interstate natural gas commerce led to constitutional challenge.

In a series of decisions culminating in *Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), this Court held that states were prohibited, by the negative implications of the Commerce Clause of the United States Constitution (the "dormant commerce clause"), from directly burdening interstate commerce with natural gas regulation, even in the absence of federal regulation. *Id.* at 88-90.

What became known as the "*Attleboro* doctrine" provided that states could regulate retail natural gas sales, deemed to be intrastate activity, but not wholesale sales, deemed to be in the realm of interstate commerce reserved for the federal government. *See id.*[20] Additional decisions further defined the contours of where this line fell, elucidating, when taken together, a detailed boundary of state authority. *See, e.g., Missouri ex rel. Barrett v. Kansas City Natural Gas Co.*, 265 U.S. 298 (1924) (holding that states could not compel an interstate pipeline to reduce its rates for natural gas sales to local distribution companies, because "the sale of gas in wholesale quantities.... Is

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[20] *See Energy Law & Transactions*, § 2.04[2] ("The [*Attleboro*] Court reasoned that retail, intrastate sales of electricity were 'essentially local' in character and only imposed an indirect burden on interstate commerce. Consequently, such sales were subject to state regulation. The Court, however, held that wholesale interstate transactions involving electricity were essentially national in character and imposed a direct burden on interstate commerce, and lay outside the states' regulatory authority." (internal quotations omitted)).

fundamentally interstate from beginning to end.... The paramount interest is not local but national").[21]

The boom of interstate natural gas sales in the 1920's made the lack of interstate natural gas regulation increasingly problematic. *History of Regulation*, *supra* n.18. In 1935, the Federal Trade Commission issued a report outlining "numerous abuses" by natural gas monopolies. Schwartz, *supra* n.19, at 558. The report—and pressure from state regulatory commissions—prompted Congressional action, leading to passage of the NGA. *Id.*; *see also Energy Law & Transactions* § 3.02[1][c][i].

B. In The NGA, Congress Adopted the *Attleboro* Demarcation and Established A Dual-Regulatory System of Mutually-Exclusive Sovereign Power.

The NGA's explicit purpose was to fill the "regulatory void" created by the *Attleboro* doctrine. *See* H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess. 1-2 (1937); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 511 (1989) ("the legislative history of the NGA is replete with assurances that the Act 'takes nothing from the State [regulatory] commissions: they retain all the State power they have at the present time'" (quoting 81 Cong. Rec. 6721 (1937)).

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[21] *See also* Lindh, F., *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 Energy L.J. 277, 285 ("under the *Attleboro* doctrine, the Supreme Court attempted to separate into entirely distinct spheres the interstate and intrastate aspects of electricity and natural gas by means of a mechanical, bright line test").

Congress' intent was to create a seamless and complementary dual-regulatory system, with the states retaining all historic powers over retail sales. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("*Panhandle I*") (noting that the NGA, "though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions"); *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (explaining that the NGA was intended by Congress to be "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare").[22]

To achieve this end, Congress embraced the sharp interstate/intrastate division delineated in the *Attleboro* line of cases. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 214 (1964) ("What Congress did [in establishing the reach of federal power in the NGA] was to adopt the test developed in the Attleboro line"); *Arkansas Elec.*, 461 U.S. at 379 ("Congress, partly to avoid drawing the precise line between state and federal power by the litigation of particular cases, had adopted the 'mechanical' line

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[22] *See also, e.g., Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506 (1942); *Fed. Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-04 (1949) ("*Panhandle II*"); *Interstate Natural Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690 (1947); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 609-10 (1944) (explaining that the NGA "was designed to take no authority from State commissions and was so drawn as to complement and in no manner usurp State regulatory authority" (internal quotations omitted)).

established in *Kansas City* and *Attleboro* as the statutory line dividing federal and state jurisdiction").

In adopting the *Attleboro* demarcation, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction," that would be easily determinable and applied. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. at 215. Thus, this Court has "squarely rejected the view ... that the scope of [FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest." *Id.* at 215-16; *see also Panhandle I*, 332 U.S. at 517 ("The line of the statute [is] thus clear and complete. It cut[s] sharply and cleanly between sales for resale and... sales for consumptive use").

C. The Wholesale/Retail Demarcation, Codified in the NGA, Has Remained Unchanged Since 1938.

In Section 1(b) of the NGA, Congress established federal jurisdiction over "sale in interstate commerce of natural gas for resale for ultimate public consumption," but explicitly excluded federal jurisdiction over "*any other* transportation or sale of natural gas." 15 U.S.C. § 717(b) (emphasis added). As this Court recognized soon after passage of the NGA in *Panhandle I*:

> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage [in the NGA] was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the

> explicit prohibition that the Act "shall not apply to any other ... sale."

332 U.S. at 516 (quoting Section 1(b) of the NGA); *see also id.* at 517-18 (remarking that the NGA "had no purpose or effect to cut down state power.... The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way");[23] *Nw. Cent.*, 489 U.S. at 510 ("When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. It 'did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act'" (quoting *Panhandle II*, 337 U.S. at 502-03)).

While other sections of the NGA grant FERC enumerated powers, all of these powers are limited by the fundamental jurisdictional grant in Section 1(b). *Panhandle II*, 337 U.S. at 508 (explaining that the powers of FERC in Sections 4, 5 and 7 of the NGA are subject to the jurisdictional limitations in Section 1(b)).[24] Indeed, in the NGA, FERC's

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[23] Petitioners' and the Solicitor General's arguments that the Wisconsin Respondents' lawsuits threaten the national uniformity desired in the federal realm are misplaced, as the Wisconsin Respondents' claims fall cleanly on the state side of regulation in which Congress intended to preserve each state's authority to regulate. It is not the Court's role to second-guess this regulatory system. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978). Petitioners' and the Solicitor General's argument that allowing these state antitrust claims to proceed might lead to widespread confusion is also misplaced, as the Wisconsin Respondents' claims require the same *mens rea* of knowing participation in a conspiracy to inflate retail prices as Sherman Act claims.

[24] *See also* Demarest, W., Jr., "Traditional" NGA Jurisdictional Limits Constrain FERC's Market Manipulation Authority, 31

enumerated powers are textually linked back to the jurisdictional authority granted to FERC in Section 1(b). *See, e.g.*, NGA, Section 4, 15 U.S.C. § 717c (enumerated powers are "subject to the jurisdiction of the Commission"); Section 5(a), 15 U.S.C. § 717d(a) (same); Section 7, 15 U.S.C. § 717f(b) (same); *cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (internal quotation omitted)).

Consistent with FERC's explicitly limited jurisdiction, this Court has repeatedly made clear that the NGA did *not* disturb the states' historic role in regulating *retail* sales of natural gas for consumption. *See, e.g.*, *Panhandle I*, 332 U.S. at 521 (explaining that Congressional intent to permit continued state regulation is "clear, in view of the [NGA's] historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over"); *id.* at 520 ("We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority"); *Panhandle II*, 337 U.S. at 513 ("The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation

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Energy L. J. 471, 471-72 (2010) ("Even a cursory review of the court cases dealing with the Commission's exercise of delegated authority discloses a number of decisions [that turned on] the scope of the Commission's *jurisdiction* [pursuant to Section 1(b)]" as opposed to the enumerated powers in other sections of the NGA (emphasis added)).

of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other").

D. For More Than Seven Decades, This Court Has Determined Preemption Under the NGA on the Basis of the Wholesale/Retail Demarcation.

In an unbroken line of cases spanning more than seven decades,[25] this Court has confirmed the states' powers to regulate retail sales of natural gas for consumption. *See, e.g., Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943); *Hope Natural Gas Co.*, 320 U.S. at 609-10; *Interstate Natural Gas Co.*, 331 U.S. at 690; *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 684 n.13 (1954); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 27 (1961); *La. Power & Light Co.*, 406 U.S. at 631 (1972); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 186 (1983); *Nw. Central*, 489 U.S. at 506-07; *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) ("for a half

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[25] The Court has recognized that, while its interpretation of the Commerce Clause has evolved, Congress has remained satisfied for more than 75 years with the *Attleboro* demarcation codified in Section 1(b). *Arkansas Elec.*, 461 U.S. at 379 (explaining that Congress' decision to adopt the *Attleboro* precedent in the NGA "shifted this Court's main focus—in determining the permissible scope of state regulation of utilities—from the constitutional issues that concerned us in *Attleboro* to analyses of legislative intent"); *cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there" (internal quotation omitted)).

century Congress has been aware of our conclusion in [*Panhandle I*]... and in the years following that decision has only reaffirmed the power of the States in this regard"). Through the many opinions of this Court interpreting the NGA, the historic powers of the states to regulate natural gas have always been preserved.

The dividing line between federal and state regulation of the natural gas industry has always been the nature of the sale. From passage of the NGA in 1938 through the period in question (2000-2002), the federal government has maintained exclusive jurisdiction over wholesale sales of natural gas in interstate commerce, and the states have maintained their traditional jurisdiction over retail sales of natural gas for consumption.

Despite the clarity of the wholesale/retail division established by Congress in the NGA, this Court has had many occasions to review application of that demarcation to integrated energy markets. *Cf. Arkansas Elec.,* 461 U.S. at 377 ("Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom"). This Court has always been guided by the principle that, in analyzing whether a state regulation is preempted, the side of the wholesale/retail divide on which the regulated conduct falls controls, regardless of the inevitable spill-over effect that regulation might have on the other side of the divide.

This principle is well-illustrated in three decisions of this Court. In *Champlin Refining Co. v. Corp. Comm'n of State of Okla.*, 286 U.S. 210 (1932), the Court considered whether Oklahoma regulations

requiring well-operators in a common oil and natural gas field to *produce* gas ratably[26] violated the dormant commerce clause (and thus was on the federal side of the *Attleboro* line). The Court concluded that because production and gathering of natural gas is considered an intrastate activity akin to mining, Oklahoma was not prohibited from enforcing this requirement. *Id.* at 235.

The Court in *N. Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963), however, considered whether a Kansas state agency's order, requiring an interstate pipeline to *purchase* gas ratably from the wellhead producers in a common field, was preempted by the NGA. Distinguishing *Champlin*, the Court concluded that, because the order was directed at an interstate pipeline engaged in the transportation of natural gas, this fell on the interstate side of the *Attleboro* line codified in the NGA. *Id.* at 91-92. Therefore, the Kansas Order was preempted. *Id.*

Similarly, in *Northwest Central*, the Court considered Kansas' more evolved ratable-taking regulation, providing that rights to extract gas from a common field would be lost if well-head producers unduly delayed extraction (a regulation designed to encourage ratable taking). 489 U.S at 423. The Court held that, because the regulation targeted the *producers* of natural gas, it fell on the intrastate side

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[26] As the Court in *Northwest Central* explained, extracting natural gas from a common pool causes gas to flow towards the extracting well and away from others. Absent regulation, this might lead to a wasteful race to extract. Ratable-taking regulations are designed to prevent waste and preserve natural resources. *Nw. Cent.*, 489 U.S. at 497.

of the *Attleboro* demarcation and the Kansas regulation was not preempted. *Id.* at 497, 507-09.[27]

Understandably, the district court in *Northwest Central* found that the Kansas regulation would have a "probable" effect on wholesale prices subject to FERC regulation. 489 U.S. at 506, 508. Yet, since this Court determined that the regulation was safely within the retail realm of the states' regulatory powers, this fact did not change the result. The Court observed:

> In analyzing whether Kansas entered a pre-empted field, we must take seriously the lines Congress drew in establishing a dual regulatory system.... To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, *for there can be little if any regulation of production that*

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[27] All three of these cases dealt with the production of gas that would be sold to interstate pipelines. All involved regulations aimed to promote ratable production of natural gas by well-head producers in a common field. *Champlin*, 286 U.S. at 235; *N. Natural*, 372 U.S. at 84; *Nw. Cent.* 489 U.S. at 423. *Champlin* and *Northwest Central* involved regulations applied to well-head operators who *sold* to interstate pipelines, whereas the regulations in *Northern Natural* were applied to interstate pipelines who *bought* from well-head producers. There was an inevitable affect on both interstate activity (transport) and intrastate activity (production) that was impossible to ignore. However, that fact was irrelevant to the Court's analysis. The side of the *Attleboro* line on which the regulation falls is dispositive, regardless of the impact the regulation might have on the other side of the wholesale/retail divide.

> *might not have at least an incremental effect on the costs of purchasers in some market and contractual situation....*

Nw. Cent., 489 U.S. at 512-14 (emphasis added). Lastly, the Court explained:

> It is inevitable that jurisdictional tensions [will] arise as a result of the fact that [state and federally regulated elements coexist within] a single integrated system.... In the integrated gas supply system, these jurisdictional tensions will frequently appear in the form of state regulation of producers and their production rates that has some effect on the practices or costs of interstate pipelines subject to federal regulation. *Were each such effect treated as triggering [an affirmative finding of] conflict pre-emption, this would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish in § 1(b), and would render Congress' specific grant of power to the States to regulate production virtually meaningless.*

Id. at 515 (emphasis added).[28]

At the same time, this Court recognized in *Northwest Central* that there could be situations in

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[28] In *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621 (1972), this Court applied the same test. A retail purchaser of natural gas challenged FERC's authority to command interstate pipelines to curtail deliveries to both wholesale and retail customers. *Id.* at 631. The Court rejected the argument that the impact on retail customers deprived FERC of jurisdiction, because FERC was regulating transportation of natural gas, safely within its designated sphere of authority.

which state regulation purportedly in the intrastate realm could still be preempted by federal law, such as where it would be impossible to comply with both state and federal law, where state natural gas regulation prevents attainment of FERC's permissible regulatory goals, or where a state's regulation lacks any legitimate state purpose, and serves only to impact federal regulation. *Id.* at 516 (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988)). While valid state regulation could be barred under these extreme circumstances, preemption analysis on these grounds "must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent.*, 489 U.S. at 516. The Court had occasion to examine such extreme cases of state regulation in *Mississippi Power, Transcon.*, and *Schneidewind.*

This Court considered whether Mississippi had the power to conduct a prudence review of wholesale electricity rates and allocations that FERC required utilities to purchase from an expensive nuclear power plant in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 362-63, 373 (1988). The Court concluded that such a review could have no purpose unless Mississippi had the power to override FERC's requirements, thus creating contradictory regulations in "matters squarely within FERC's jurisdiction" (wholesale electricity rates). *Id.* at 376; *see also Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47-48 (2003) (explaining *Mississippi Power* as a case in which the states tried to "trap" wholesale costs by denying power generators the ability to recover wholesale costs in

retail rates); *see also New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 911 F.2d 993, 1001 (5th Cir. 1990) (conceptualizing *Mississippi Power* as a filed-rate case). Because Mississippi would have made it impossible for the utilities to comply with both federal and state law, and the federal regulation was safely within FERC's jurisdiction over wholesale electricity rates under the Federal Power Act,[29] the state regulation was preempted.

In *Transcon. Gas Pipe Line Corp. v. State Oil & Gas Board of Miss.*, this Court, just as in *Northern Natural*, considered an attempt by state regulators to require interstate pipelines to purchase gas ratably from a common pool. 474 U.S. 409, 417, 421-22 (1986). Mississippi argued that, because Congress had deregulated prices of the gas purchased by interstate pipelines from that pool, Mississippi could regulate the pipelines. *Id.* This Court rejected Mississippi's argument, because a "federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Id.* at 422 (emphasis in original). Because Mississippi's regulatory ambitions would prevent achievement of Congress' deregulatory goals, Mississippi's regulation was preempted.

Lastly, this Court in *Schneidewind* considered a Michigan law that applied only to utilities, and that granted Michigan's utility-regulating authority veto power over the issuance of securities by natural gas companies subject to FERC's jurisdiction, unless

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[29] *Mississippi Power* involved the Federal Power Act, which the Court sometimes finds instructive in interpreting the NGA. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

such issuance was for a "lawful purpose" and "essential to the successful carrying out of" that purpose, and allowed Michigan unfettered power to attach conditions to any such issuance. 485 U.S. at 297-98. The overreaching Michigan law superimposed state authority, *inter alia*, upon FERC's powers to: (1) "calculate a reasonable rate of return on invested capital" in wholesale sales of natural gas in interstate commerce (under Section 4(a) of the NGA); and (2) issue certificates of "public convenience and necessity" before a company engaged in wholesale, interstate sales "constructs, extends, acquires, or operates any facility" for interstate transportation or wholesale sales of natural gas in interstate commerce (under section 7 of the NGA). *Id.* at 301-02. Because Michigan's statute lacked any legitimate state purpose, and served only to impact FERC regulations, the law was preempted. *See id.* at 308 n.10 (noting that "the purported purposes of [Michigan's statute], as applied to [interstate pipelines], appear highly artificial at best"); *see also Nw. Cent.*, 489 U.S. at 513 n.10 (explaining that the Michigan statute in *Schneidewind* "could not plausibly be said to operate in a field expressly reserved by the NGA to the States").[30]

No such extreme situation exists here. On the contrary, Wisconsin's legitimate interest in enforcing

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[30] *Kurns v. Railroad Friction Products Corp.*, 132 S.Ct. 1261 (2012), has no bearing here, as it involved a challenge by plaintiffs to an area (locomotive design parameters) where Congress had affirmatively and exclusively occupied the *entire* field. *See id.* at 1266. By contrast, the present case involves an area of traditional state regulation *deliberately reserved to the states* by Congress in the NGA.

its antitrust laws in the retail natural gas arena historically reserved to Wisconsin does not disturb FERC's authority. First, there is no impossibility of compliance with FERC's requirements and Wisconsin's prohibition against forming conspiracies in restraint of trade to the injury of its citizens. Second, Wisconsin's antitrust laws, like the federal antitrust laws, do not render unachievable FERC's regulatory goals during the time in question. Third, Wisconsin's application of its antitrust laws to retail sales of natural gas to spur competition and redress anticompetitive injuries falls squarely within Wisconsin's proper police powers and longstanding Congressional sanction, and is by no means an attempt to regulate wholesale reporting practices or prices.[31]

Indeed, if petitioners could demonstrate that their anticompetitive behavior in the retail natural gas markets were the necessary result of compliance with FERC's pricing directives, petitioners would find immunity under the filed-rate doctrine. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-64 (1986); *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S. Ct. 692, 695, 95 L. Ed. 912 (1951) ("[A customer] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission,

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[31] The Court in *Schneidewind* noted that "[o]f course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted" and carefully noted that its reasoning should not bar Michigan's power to enforce securities laws of general applicability. The Court determined that Michigan's law "is not that kind of regulation [because it] applies only to utilities and is not limited to securities sold within Michigan." 485 U.S. at 308.

and not even a court can authorize commerce in the commodity on other terms").

Petitioners raise no filed-rate defense here because FERC has already determined that petitioners' manipulative behavior violated the authorization under their blanket certificates to sell at market-based rates. *See* F.E.R.C., *In the Matter of Amendments to Blanket Sales Certificates*, Order Denying Rehearing of Blanket Sales Certificates Order, (FERC Dkt. No. RM03-10-001), 107 F.E.R.C. 61,174 (May 19, 2004)[32] (certificates "implicitly prohibited acts which would manipulate the competitive market for natural gas").[33]

The Solicitor General acknowledges the states' plenary authority over rate-setting of retail sales for consumption, and admits that FERC would lack authority to fix rates for such sales, even if they affected wholesale prices, "because such state price regulation of retail sales falls squarely within Section 1(b)'s proviso." U.S. Br. p. 28 n.6 (citing *Fed. Power*

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[32] *Available at:* http://www.ferc.gov/EventCalendar/Files/20040519212053_ RM03-10-001.pdf (last visited Nov. 19, 2014).

[33] *See also* F.E.R.C., *In Re: Enron Power Marketing, Inc., et al.*, Order Proposing Revocation of Market-Based Rate Authority and Termination of Blanket Marketing Certificates, (FERC Dkt. Nos. EL03-77-000 and RP03-311-000), 102 FERC ¶ 61,316 (Mar. 26, 2003) (*available at:* http://www.ferc.gov/Media/news-releases/2003/2003-1/EL03-77-000.pdf (last visited Nov. 19, 2014)) (explaining that, implicit in "[t]he Commission's grant of authority to sell at market-based rates, as opposed to cost-based rates ... is a presumption that a company's behavior will not involve fraud, deception or misrepresentation. Companies failing to adhere to such standards are subject to revocation of their market-based rate authority."); *accord E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1048 (9th Cir. 2007) (explaining that manipulated rates are not FERC-approved market rates).

Comm'n v. Conway Corp., 426 U.S. 271, 281-82 (1976) (acknowledging that FERC "lacks authority to fix rates for direct industrial sales")).

The Solicitor General further concedes that the states could require retail sellers to report to separate, retail-only indices, and then regulate these indices. U.S. Br. p. 26 n.6. By that logic, Wisconsin, under its rate-setting authority, could have decided that petitioners' retail prices were too high, and fined them in an amount equal to the damages sought by the Wisconsin Respondents here, distributing the fines to the putative class. There is no basis for concluding that private rights of actions seeking to challenge retail rates on antitrust grounds would impermissibly thwart FERC's authority, while direct rate-setting of retail prices would not.

The Solicitor General errs in accepting petitioners' mischaracterization that the Wisconsin Respondents' antitrust claims for unlawful restraint of trade are "based on petitioners' reporting to price indices." U.S. Br. p. 27.

This is simply not the case. All that is necessary is to show that petitioners, in furtherance of a conspiracy in restraint of trade, knowingly overcharged the Wisconsin businesses who purchased natural gas for consumption at inflated rates. Until these retail sales are consummated, with collusive intent and requisite harm, no cause of action arises. *See supra* Section I(B). This places the claims squarely within the states' plenary authority over retail sales under Section 1(b) of the NGA.[34]

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[34] The Solicitor General's position is likely influenced by the fact that, in recent years, FERC has become embroiled in numerous lawsuits, in the D.C. Circuit and elsewhere, about whether its authority over practices, in the post-EPAct context, alters the

Because respondents' antitrust actions arise at the retail level, they fall under the plenary power reserved to the states by Congress, are beyond FERC's ability to regulate, and are not preempted.

III. FERC'S CURRENT INTERPRETATION OF ITS JURISDICTION IS OWED NO *CHEVRON* DEFERENCE HERE.

The Solicitor General suggests that *Chevron* deference to its current position should play a role in the Court's analysis. It should not. First, deference under the holding in *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984), is appropriate only where a "statute is silent or ambiguous" regarding an agency's authority. *City of Arlington, Tx. v. FCC*, 133 S.Ct. 1863, 1868, 1875 (2013). The NGA is neither silent nor ambiguous as to the scope of FERC's authority. *See id.* (*Chevron* deference should not be afforded when "the statutory text forecloses the agency's assertion of authority"). To the contrary, Section 1(b) grants FERC plenary authority over wholesale sales, and grants the states

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wholesale/retail dichotomy. *See, e.g., Elec. Power Supply Ass'n v. F.E.R.C.*, 753 F.3d 216, 221 (D.C. Cir. 2014) (considering and rejecting FERC's argument that it had jurisdiction over retail practices under the FPA because they "directly affect[]" wholesale rates). FERC may be understandably concerned that this case might influence that battle, even though the lawsuits here involve the fundamentally different pre-EPAct era. *Cf. id.* at 223-25 (assessing FERC's argument that its intrusion into the retail realm was warranted by new powers granted FERC in the EPAct). However, the limited question before the Court, involving unusual circumstances that cannot recur in the same manner, post-EPAct, should ultimately have no bearing on that debate. *Cf.* U.S. Cert. Br. pp. 21, 23 ("the circumstances giving rise to respondents' state-law antitrust claims are unlikely to recur").

plenary authority over retail sales. *See supra* Section II.

Second, FERC's limited conclusion that it had authority under the NGA to issue its 2003 Code of Conduct has no bearing on the outcome of this case. As the Solicitor General concedes, FERC concluded that it had this authority, but "did not analyze its authority further." U.S. Br. p. 34. *See Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 718 (1985) (*Chevron* has no application in preemption analysis "if an agency does not speak to the question of preemption"). FERC did not announce that its regulations would displace antitrust laws, and did not conclude that it had authority to preempt state regulation of retail sales through antitrust laws. In fact, FERC repeatedly asserted that it was unable to "exercise regulatory authority over non-jurisdictional sellers' index-related practices associated with non-jurisdictional sales *before* Congress' 2005 enactment of EPAct." U.S. Br. p. 32 n.7 (emphasis added).

FERC recognized, in amending its Code of Conduct in 2003, "that the Commission does *not* have jurisdiction over the entire natural gas market," and that it was imposing "the proposed code of conduct only on the portion of the natural gas market under the Commission's jurisdiction." 68 Fed. Reg. 66,323, 66,325 (Nov. 17, 2003) (emphasis added). FERC even responded to concerns that imposing its requirements on only part of the market might unduly benefit those not subject to such requirements. *Id.* FERC did not attempt to assert control over collusive behavior in retail markets, and definitively determined it did not have jurisdiction to do so.

During the relevant time period and after, FERC concluded that it lacked the power to regulate market manipulation. *See* Federal Energy Regulatory Commission, Final Report on Price Manipulation In Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA0-2-2-000, at ES-17 (Mar. 2003) (recommending that Congress give authority to FERC or another federal agency to ensure that trading platforms for wholesale sales of electric energy and natural gas in interstate commerce are "monitored and provide price market information that is necessary for price discovery and competitive energy markets"); Testimony of Joseph Kelliher, FERC Chairman, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (Dec. 12, 2007) ("Kelliher Testimony")[35] ("[b]efore the Energy Policy Act, FERC did not have all the tools it needed to be a strong enforcement agency" and lacked "express authority [under the NGA] to prohibit market manipulation"); *id.* (FERC's powers under the amended NGA in 2005 gave it, for the first time, the "tools we needed" to "protect consumers from market manipulation," providing "strong grounding for our efforts to oversee wholesale energy markets").

In fact, FERC successfully lobbied Congress to amend the NGA to grant it the authority it lacked before 2005. FERC asked Congress to pass the EPAct for the explicit purpose of giving it powers to regulate market manipulation. F.E.R.C., Conference on

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[35] *Available at* http://www.ferc.gov/eventcalendar/Files/20071212102420-kelliher-testimony-12-12-07.pdf (last visited Nov. 19, 2014).

Enforcement Policy, AD07-13-000 (Nov. 14, 2007)[36] (acknowledging that FERC lacked regulatory authority to guard against market manipulation before Congress granted FERC additional powers in 2005 "inspired in large part by the market manipulation that occurred in 2000-2001").

On this record, FERC, merely by joining the Solicitor General's Brief, should not be afforded *Chevron* deference in suggesting to this Court that it had the sweeping authority under the NGA that it earlier disclaimed. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency [authority]").

IV. UNDER THE FACTS HERE, A HEAVY PRESUMPTION AGAINST PREEMPTION SHOULD BE APPLIED.

This case lies at the confluence of a number of doctrines imposing strong presumptions against finding preemption here. First, two areas of traditional state regulation are involved: antitrust and retail sales of natural gas. *See supra* Section I(A). For this reason alone, a presumption against finding preemption is warranted. *CTS Corp. v. Waldburger*, ___ U.S. ___, 134 S.Ct. 2175, 2188 (2014), *reh'g denied*, ___ U.S. ___, 135 S.Ct. 23 (2014) (collecting cases and explaining "because the States are independent sovereigns in our federal system, the Court assum[es] that the historic police powers of the States were not to be superseded by the Federal

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[36] *Available at:* http://www.ferc.gov/media/statements speeches/kelliher/2007/11-14-07-kelliher.pdf (last visited Nov. 19, 2014).

Act unless that was the clear and manifest purpose of Congress.... The presumption has greatest force when Congress legislates in an area traditionally governed by the States' police powers"); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (explaining that courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Wos v. E.M.A. ex rel. Johnson,* 133 S.Ct. 1391, 1400 (2013) ("In our federal system, there is no question that States possess the traditional authority to provide tort remedies to their citizens as they see fit" (internal quotation omitted)).

In addition, these general presumptions are given a heightened application in the natural gas field, "so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent.*, 489 U.S. at 516; *see also New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one").[37] The Court also requires an explicit Act of Congress to alter traditional divisions of authority between the federal and state governments, and will not infer such an alteration merely from the fact of that an

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[37] Galle, B. and M. Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L.J. 1933, 1943-44 (2008) (noting that the application of these presumptions is a critical tool in respecting federalist principles).

area is regulated. *See United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Hillsborough Cnty.*, 471 U.S. at 717 (1985) ("To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence"). Petitioners' proposed replacement of seven decades of precedent with a radical new "direct effects" test must be scrutinized with these strong presumptions against preemption in mind. Petitioners' arguments do not survive such scrutiny.

V. PETITIONERS' RADICAL PROPOSED TEST WOULD UNRAVEL THE DUAL-REGULATORY SYSTEM IN THE NGA AND DRASTICALLY CURB STATE POWERS.

A. Petitioners' Proposed Test Would Dismantle the Complementary Dual-Regulatory System Created By Congress.

To understand the impact of petitioners' theory, it is important to first understand that the test petitioners argue is *required* (preemption applies if practices directly and simultaneously alter the rates in jurisdictional sales (Pet. Br. pp. 2, 28, 32, 33)) is not the test petitioners are *applying* (preemption applies if lawsuits might influence behavior, causing a chain-reaction that might ultimately impact the rates in wholesale sales (*id.* pp. 28, 32)).

Petitioners' conjecture is that, over time, a series of fabricated sales and wash trades by multiple market participants, acting in concert, could eventually change the way an index calculates rates, compiled some time after the series of false reporting. That change in the index-compiled rate could alter the price of future wholesale sales that future buyers and sellers choose to price off that index. Pet. Br. p. 28. Liability to lawsuits like those brought by the Wisconsin Respondents[38] "would force jurisdictional sellers to alter their behavior,"[39] *i.e.*, such lawsuits, if successful, could impact voluntary misreporting, which could change the way misreporting affects the private indices, which then could change the prices of future wholesale contracts if buyers and sellers choose to price off such indices. *Id.* p. 32.

Petitioners speculate that a change in incentives they have to refrain from misreporting might have a future effect, via a series of steps, on prices in future wholesale sales. *Cf.* U.S. Br. p. 27 (arguing that index manipulation could only impact *subsequent* sales). Despite their labeling of such speculative, indirect impact as a "direct effect," petitioners

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[38] It bears mentioning that the Wisconsin Respondents' lawsuits, first filed eight years ago, concerning conduct that took place more than a decade ago, have not had a "simultaneous" effect on anything.

[39] The upper limit of damages sought by the Wisconsin Respondents would amount to little more than some of the petitioners receive in tax breaks each year, and only a very small percentage of their combined annual profits. For example, ExxonMobil, ultimate parent of the Duke Defendant entities, received $600 million in tax breaks in 2011. Leber, R., "Exxon, Chevron Made $71 Billion Profit in 2012 As Consumers Paid Record Gas Prices," Feb. 1, 2013 (*available at:* http://thinkprogress.org/climate/2013/02/01/1525441/exxon-chevron-2012-profit/ (last visited Nov. 19, 2014)).

actually apply a "butterfly effects" test that is entirely new and patently inconsistent with a "direct effects" analysis. *See California Indep. Sys. Operator Corp.*, 372 F.3d at 403 (to "directly govern[] the rate in a jurisdictional sale," a practice must, without the mediation of other events or acts, have an instantaneous one-to-one impact on the rates on wholesale sales. Anything that does so "ultimately," or through an intermediary act or event is "indirect").[40]

Petitioners' test would discard Congress' wholesale/retail dichotomy and replace it with one in which FERC had exclusive reach but limited grasp. Production, transportation, wholesale and retail sales will always exist in an integrated market. *Nw. Central*, 489 U.S. at 515. What happens on one side of the *Attleboro* line always affects what happens on the other. Holding this relationship to be outcome-determinative for preemption purposes, as petitioners suggest, would have the federal realm subsume that of the states, contrary to Congress' intent and this Court's precedent. It would sweep away historic state regulation, leaving a void, and the uncertain question whether FERC has either the capability or the inclination to fill it.

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[40] Similarly, *Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d. 1496 (D.C. Cir. 1990) does not support petitioners' theory. In that case, the court rejected the American Gas Association's (acting as an *amicus* at the *certiorari* stage) argument that any contract that would likely influence a jurisdictional rate should fall under FERC's authority. The Court discredited the view that FERC would have authority under Section 5(a) "to control wellhead rates merely because those rates are elements in the computation of pipelines' sales rates. Indeed, petitioners' theory is, more generally, an oxymoron—[FERC] jurisdiction over nonjurisdictional contracts." 912 F.2d. at 1506.

The interconnectivity of federal and state regulated markets has only been deepened by the voluntary acts of market participants. Some wholesale and some retail sellers of natural gas voluntarily provide sales information to private, third-party publishers, who voluntarily publish, for a profit, summaries that rely upon such information. Buyers and sellers voluntarily negotiate arms-length contracts with prices sometimes pegged to these indices.[41] Petitioners assert that this voluntary interconnectivity of the unregulated natural gas market prohibits lawsuits challenging retail sales such as this, brought under laws of general applicability, if such sales happen to be priced off the indices. Petitioners vehemently assert that any challenge to sales prices made off an index would somehow directly affect wholesale practices and rates, and is therefore preempted.

Any lawsuit, and presumably any state law or regulation, including the Wisconsin antitrust statute of general applicability, would likely run afoul of this proposed rule, prohibiting the very regulation of retail prices that all parties admit is properly within state authority. Pet. Br. p. 38; U.S. Br. pp. 25-26.

Put another way, in a market integrated by the voluntary acts of market participants, everything has

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[41] As FERC observed in 2004, the defendants—sophisticated buyers and sellers—were better and more currently informed than the indices, and were therefore "unlikely to rely on indices primarily for their price information." Report on Natural Gas and Electricity Price Indices, FERC, May 5, 2004 Docket Nos. PL03-3-004 and AD03-7-004-16, p. 16. The fact that petitioners' use of published indices as pricing references was neither necessary nor required represents another reason why their suggestion that reference to them means FERC controls the field is both factually wrong and legally untenable.

a consequential effect on everything else. If such a derivative effect were deemed to be dispositive in preemption analysis, there would be no state realm. This is the very consequence that the Court has been mindful to avoid for decades, and it should be rejected here. *Cf. Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d at 1507 (accusing such arguments as lacking a "conceptual core and thus seem[ing] awkward and implausible as a jurisdictional boundary"); U.S. Br. p. 23 (noting that permitting a consequential effect to support a conclusion of preemption "would stretch the NGA's grant of authority to FERC beyond any logical mooring").

Such a test would also impermissibly allow market participants to vary FERC's jurisdiction. But market participants have no power to expand FERC's jurisdiction—only Congress can. This is particularly true when market participants voluntarily decide to report,[42] and wholesale and retail sellers voluntarily decide to price contracts off of the indices. Any theory that would allow FERC's jurisdiction to subsume the regulatory sphere reserved by Congress to the states, based on the voluntary acts of market participants, is fundamentally flawed. *Cf. Pennsylvania Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 420, (1952) ("[FERC's] power does not vary with the rise and fall of the Susquehanna River").

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[42] Even after the EPAct, neither jurisdictional nor non-jurisdictional sellers have any duty to report sales information to indices. F.E.R.C., Prohibition of Energy Market Manipulation, 18 C.F.R. Part 1c (FERC Dkt No. RM06-3-000, Order No. 670) (Jan. 19, 2006).

Petitioners' approach would allow market participants to manipulate FERC's authority for their own ends, and would allow wrongdoers, such as petitioners, to insulate themselves from state liability by duplicating misconduct perpetrated in the state realm in a federally-regulated area. By petitioners' perverse reasoning, misconduct that permeates both the wholesale and retail markets triggers a conclusion of preemption. Expanding the scope of misconduct from the retail to the wholesale realm, petitioners could therefore achieve total immunity from state law. This cannot be the right result.

Most disturbingly, petitioners' test would grant the violators of laws of general applicability *carte blanche* to self-impose complete immunity simply through laundering their misconduct through federally regulated activity. Such an evisceration of civil liability, in the name of achieving personal immunity for a league of acknowledged wrongdoers, would be manifestly unjust.

B. Petitioners Would Create a Regulatory Void in Which Neither the States Nor FERC May Act, Contrary to Congressional Intent in Enacting the NGA.

FERC lacked the power, during the period in question (2000-2002) to: penalize retail sellers for misreporting; fine retail sellers for manipulating private-market indices; or punish retail sellers for swindling retail purchasers.[43] Preventing the states from acting in these areas through the pretext of

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[43] FERC's enhanced penal powers, post-EPAct, are not in question here.

preserving FERC's authority would mean there was a no-holds-barred zone of unregulated activity, beyond the reach of federal or state power. This result is directly contrary to Congress' intent in creating a complementary and effective dual-regulatory system, creating exactly the sort of gap Congress sought to fill in 1937. *See, e.g., Panhandle I*, 332 U.S. at 516 (explaining that the "primary purpose [of the NGA] was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions"); *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. at 631 (explaining that the NGA was intended by Congress to be "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare").

Because FERC could not regulate retail sales during the relevant period, petitioners' theory would insulate natural gas companies from any retail regulation. *But see Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. at 631 ("when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created"). Such a regime would be devastating to effective federal and state regulation, as well as to the state and national economies, and be exactly the result that the entire body of natural gas regulation was designed to avoid.

C. Petitioners' Proposed Test for Evaluating Private Actions Is Administratively Unworkable.

Petitioners' test ignores the nature of the claim (antitrust) and focuses on a self-serving and unsupported assertion of what evidence plaintiffs may present at trial (index manipulation). Preemption, however, must be a threshold question, and it was the explicit will of Congress to make preemption under the NGA a bright line issue that is determinable on the basic nature of a statute or regulation. It is unworkable to have a test that might bar a private lawsuit on preemption grounds based on what the jury finds at trial.

For a Court to wait until the end of a trial to conduct a preemption analysis would result in a monumental waste of judicial and public resources. *But see* Fed. R. Civ. P. 1. This is not the result Congress intended. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. at 215-16 ("our decisions have squarely rejected the view ... that the scope of [FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis"). Yet a case-by-case analysis, which may not be complete until *after* the finding of facts at trial, is exactly the test petitioners are proposing.

D. The Application of Petitioners' Unprecedented "Butterfly Effects" Test Is Purely Speculative.

Petitioners' hypothesis[44] that an attenuated tie exists between lawsuits of this nature and wholesale prices is unsupported. Moreover, it is purely speculative and unlikely to be accurate,[45] given that each step of the argument is linked by future voluntary acts that might or might not occur. For instance, if petitioners wish to avoid state antitrust liability, the path of least resistance is ceasing to enter into anti-competitive conspiracies with other market participants. That is the basis of liability, the objective of the antitrust laws, and the behavior sought to be regulated. Compliance with the basic prohibitions of antitrust law would insulate petitioners from any such lawsuit that somehow touches on voluntary reporting, and it certainly would be the aim of both federal and state antitrust laws that such suits prompt petitioners to comply in this manner.

In addition, the analysis has been materially altered by the passing of the EPAct; *see* FERC, Energy Policy Act of 2005, Fact Sheet (Aug. 8,

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[44] *But see Arkansas Elec.*, 461 U.S. at 389 (rejecting the claim that a hypothetical conflict should trigger preemption); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (same).

[45] Petitioners have no answer to this argument other than to assert that this issue was somehow waived by the Wisconsin Respondents, but the record does not reflect such a phantom waiver. The boundaries of FERC's jurisdiction are not waivable; they are set by act of Congress. In any event, if petitioners were correct, the proper response would be to remand to the court of appeals for consideration of this issue. *Cf.* U.S. Br. p. 29 n.4 (making the same recommendation).

2006)[46] ("The [EPact]... makes the most significant changes in Commission authority since the New Deal's Federal Power Act of 1935 and the Natural Gas Act of 1938"). The EPAct gave FERC new regulatory powers, designed specifically to prevent the recurrence of market manipulation. *See* 151 Cong. Rec. S. 9344 (July 29, 2005) ("[The EPAct] puts in place *the first ever* broad prohibition on manipulation of electricity and natural gas markets" (statements of Senator Cantwell) (emphasis added)). FERC after the EPAct is a fundamentally different regulatory body than it was prior to 2005. *See, e.g.*, Fact Sheet (explaining that the EPAct gave FERC, for the first time rule-making authority with respect to market manipulation).[47]

For this reason, it is unlikely that a fact pattern similar to that presented here will recur. Indeed, the Solicitor General, in its *certiorari* brief, joined by FERC, came to this same conclusion. *See, e.g.*, U.S. Cert. Br. pp. 21, 23 ("the question presented is of limited prospective importance due to significant changes in the regulatory environment in the wake of the Western energy crisis.... the circumstances giving rise to respondents' state-law antitrust claims are unlikely to recur"). For this reason, the ultimate impact of this case on participants in natural gas markets is likely to be nil.

What is certain, however, is that dismissing the Wisconsin Respondents' claims will deny the industrial and commercial plaintiffs any relief for the

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[46] *Available at:* http://www.ferc.gov/legal/fed-sta/epact-fact-sheet.pdf (last visited Nov. 19, 2014).

[47] Notably, Congress denied FERC authority to regulate the private indices in the EPAct. Energy Policy Act of 2005, § 316, Pub. L. No. 109-58, 119 Stat. 593 (2005).

injury they suffered at the hands of the petitioner conspirators. As petitioners well know, FERC cannot redress these injuries, as Congress deliberately provided the states the solitary power to remedy such wrongs. The tangible harm to the businesses at issue, and the real consequences to many business and commercial retail markets, under petitioners' approach, would be monumental. *Energy Law & Transactions* § 50.03[5][a][ii] (noting that, as of 2012, over five million separate businesses relied on retail natural gas purchases to support their commercial operations).

Most fundamentally, it would be perverse if the NGA, designed to create a comprehensive complementary system of regulation, prompted by historical monopolistic abuses by natural gas companies, were used to excuse anticompetitive behavior and bar relief to the victims of such wrongful conduct. *Cf. Hope Natural Gas Co.*, 320 U.S. at 610 (explaining that the "primary aim" of the NGA is "to protect consumers against exploitation at the hands of natural gas companies"). This is the naked truth of the matter before the Court, and it, perhaps more than anything else, demonstrates why petitioners' arguments are dangerous and wrong.[48]

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[48] *See Wis. Amicus* (urging that the Wisconsin Respondents' claims not be dismissed because the Wisconsin Constitution allows every person "a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property or character...." and therefore "The laws of Wisconsin make it clear that persons injured by anticompetitive conduct deserve an effective remedy" (citing Wis. Const. art. I, § 9)); *see also id.* at pp. 4, 15 ("Wisconsin is interested... [in] prevent[ing] the diminution of the ability of the Attorney General, as well as private parties, to respond to the energy crisis and to any future, similar misconduct....For years, the Attorneys General have fought to hold accountable the people and entities that

To respect petitioners' allegations and deceptive arguments to achieve their avaricious designs would be to mockery of everything the Act was designed to accomplish, and an abandonment of more than 70 years of unbroken precedent from this Court.

CONCLUSION

For these reasons, and in the interests of justice to those harmed by petitioners' collusive actions, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

November 21, 2014

ROBERT L. GEGIOS*
RYAN M. BILLINGS
STEPHEN D. R. TAYLOR
MELINDA A. BIALZIK
AMY IRENE WASHBURN
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110
rgegios@kmksc.com

Counsel for
The Wisconsin Respondents

**Counsel of Record*

---

manipulated natural gas and energy markets. This hard work has helped not only to compensate victims, but to deter future misconduct").

REPLY BRIEF

No. 13-271

IN THE
Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,
Petitioners,

v.

LEARJET, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
FREDERICK LIU
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

[additional counsel listed on inside cover]

Additional counsel:

DOUGLAS R. TRIBBLE
KEVIN M. FONG
PILLSBURY WINTHROP
SHAW PITTMAN LLP
Four Embarcadero Center,
22nd Floor
San Francisco, CA 94105
(415) 983-1000

MICHAEL J. KASS
VLP LAW GROUP LLP
739 Calmar Avenue
Oakland, CA 94610
(510) 629-6089

Counsel for the defendant Dynegy entities

MARK E. HADDAD
MICHELLE B. GOODMAN
NITIN REDDY
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the defendant CMS entities

JOSHUA D. LICHTMAN
FULBRIGHT &
JAWORSKI L.L.P.
555 South Flower Street,
Forty-First Floor
Los Angeles, CA 90071
(213) 892-9200

Counsel for Shell Energy North America (U.S.), L.P.

AARON M. STREETT
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1234

Counsel for GenOn Energy, Inc.

ROXANNA A. MANUEL
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
865 S. Figueroa St., 10th
Floor
Los Angeles, CA 90017
(213) 443-3000

Counsel for Shell Energy North America (U.S.), L.P.

OLIVER S. HOWARD
AMELIA A. FOGLEMAN
CRAIG A. FITZGERALD
GABLE GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4800

Counsel for the defendant ONEOK entities

BRENT A. BENOIT
STACY WILLIAMS
LOCKE LORD LLP
3400 J.P. Morgan Chase Tower
600 Travis
Houston, TX 77002
(713) 226-1200

Counsel for El Paso LLC

SARAH JANE GILLETT
HALL, ESTILL, HARDWICK, GABLE, GOLDEN, & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, OK 74103-3706
(918) 594-0400

Counsel for the defendant Williams and WPX entities

MICHAEL JOHN MIGUEL
KASOWITZ BENSON TORRES & FRIEDMAN LLP
2029 Century Park East
Suite 750
Los Angeles, CA 90067
(424) 288-7900

Counsel for e prime, Inc.

STEVEN J. ROUTH
ORRICK, HERRINGTON, & SUTCLIFFE, L.L.P.
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for the defendant AEP entities

JOEL B. KLEINMAN
ADAM PROUJANSKY
LISA M. KAAS
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, D.C. 20006
(202) 420-2200

Counsel for Duke Energy Trading and Marketing, L.L.C.

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IN THE

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IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

SUMMARY OF ARGUMENT

Underneath the regulatory jargon, this is a simple case. The Natural Gas Act preempts the field, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988), and "FERC's exclusive jurisdiction applies not only to rates" but also to jurisdictional gas companies' contracts and practices that directly "affect wholesale rates," *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988). Thus, "States may not regulate" such contracts and practices. *Id.* at 374. Yet Respondents seek to use state law to regulate practices that FERC has always had authority to regulate and that FERC *in fact does regulate*. This is a straightforward case of field preemption.

Respondents primarily argue that their suits are not preempted because they seek to regulate "matters that Section 1(b) of the Act reserves to the States." Learjet Br. 17 (citing *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493 (1989)). But what Respondents' lawsuits target—alleged index manipulation—is *not* something that Section 1(b) "reserves to the States." It is a *practice* by FERC-regulated wholesalers that *affects* prices in both wholesale and retail sales. The statute and cases say that such a practice falls within FERC's jurisdiction, which is exclusive. And FERC itself so concluded, in a finding entitled to *Chevron* deference.

Perhaps recognizing that their suits are not within Section 1(b)'s reservation of state authority, Respondents try to expand that provision: They say Section 1(b) reserves to the states all matters that "arise" out of or "concern" retail sales. Learjet Br. 17-18. But the NGA's plain language refutes that notion. The statute gives FERC exclusive jurisdiction over wholesale rates and the states exclusive jurisdiction over retail rates. 15 U.S.C. § 717(b). But when it comes to *practices that affect rates*, there is no such symmetry: Section 5(a) gives FERC exclusive jurisdiction over any "practice * * * affecting" wholesale rates, *id.* § 717d(a), and does not reserve authority to the states to regulate practices affecting retail rates. Thus, where, as here, a practice affects both wholesale rates and retail rates, the NGA places that matter squarely within FERC's exclusive jurisdiction.

That conclusion is consistent with *Northwest Central*, which rejects Respondents' "arise from" test. *Northwest Central* explains that when a state's regulation arises out of a state-regulated area, but is

aimed at something in the federal field, it is field-preempted. 489 U.S. at 513-514.

Respondents' remaining theories fare no better. They say this is a conflict-preemption case, but it is not. They say the NGA does not field-preempt statutes of general applicability, but that too is incorrect. And finally, they say they do not seek to regulate the same thing as FERC at all: They are aiming at a conspiracy to inflate retail rates, they say, while FERC regulates index manipulation. But that notion collapses upon even cursory review. Respondents did not allege collusion in the abstract, or some retail-specific conspiracy. They alleged collusion *to manipulate indices*, and actual manipulation of those indices. And their complaints rely heavily on FERC's index-manipulation findings. Respondents' claims and FERC's regulation are directed at the same thing.

Unable to prevail on the question the Court granted certiorari to decide—whether the NGA "preempts state-law claims challenging industry practices that *directly affect* the wholesale natural gas market," Pet. i (emphasis added)—Respondents attack the question's factual predicate and argue that the practices did not directly affect the wholesale market. The argument fails on many fronts. First, Respondents' own complaints allege that "[d]efendants' conspiracy *directly affected* prices for natural gas." J.A. 357, 412 (emphasis added). Second, Respondents' expert conceded the point. Third, the District Court determined, on undisputed evidence, that the alleged index-manipulation practices directly affect wholesale rates. Fourth, Respondents waived the issue below. And finally, the direct effect is obvious: Index prices were routinely incorporated as the price term in jurisdictional transactions.

FERC thus had (and has) jurisdiction to regulate Petitioners' alleged index-manipulation practices, and states do not. That conclusion creates no unfairness: FERC has authority to punish index manipulation, and Respondents could have sought recompense under the *federal* antitrust laws—they simply did not timely do so. The Ninth Circuit should be reversed.

ARGUMENT

I. RESPONDENTS' LAWSUITS ARE PREEMPTED.

A. FERC Has Exclusive Jurisdiction Over Practices Directly Affecting Jurisdictional Rates.

The rule in this case is straightforward: FERC has exclusive jurisdiction under NGA Section 5(a) to regulate any "practice * * * affecting" wholesale rates. 15 U.S.C. § 717d(a). That provision gives FERC authority to regulate practices that directly—as opposed to incidentally or tangentially—affect those rates. *Schneidewind*, 485 U.S. at 304, 308; *Order on Rehearing and Clarification*, 139 F.E.R.C. ¶ 61,132, ¶ 358 (May 17, 2012) ("practices that directly affect or are closely related to" wholesale rates); *ISO New England, Inc.*, 122 F.E.R.C. ¶ 61,144, ¶¶ 61,762-63 (Feb. 21, 2008); Opening Br. 35-36.

Because FERC has exclusive jurisdiction to regulate practices directly affecting wholesale rates, states "may not regulate" them. *Mississippi Power*, 487 U.S. at 374. This ouster of state regulation is a matter of field preemption. *Schneidewind*, 485 U.S. at 305. There "can be no divided authority" when, as here, "[C]ongress has established an exclusive form of regulation." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 580 (1981) (citation omitted).

The NGA thus creates an exclusive federal field. In determining when a state has invaded that field, this

Court asks whether the state's regulation is "directed at" something FERC may regulate, *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 92 (1963), or "amounts to a regulation" of matters within FERC's sphere, *Schneidewind*, 485 U.S. at 307; Opening Br. 23. If so, it is preempted, no matter its purpose or putative subject area. *Northwest Central*, 489 U.S. at 518.

These precedents resolve this case. FERC has exclusive jurisdiction to regulate practices that directly affect jurisdictional rates; FERC regulates index-manipulation practices because they directly affect jurisdictional rates; and Respondents' state-law suits, which amount to regulation of the same practices, are field-preempted. That should be the end of the matter.

B. Respondents Cannot Avoid Field Preemption By Relying On Section 1(b).

Respondents and their *amici* argue that Respondents' suits are not preempted because they arise out of retail sales, and NGA Section 1(b) reserves regulation of retail sales to the states. Learjet Br. 17; States Br. 11-13. That is incorrect as a simple matter of statutory interpretation. Respondents' damage claims may *arise* out of retail sales, but they *regulate* index manipulation. And index manipulation is not a matter reserved to the states under Section 1(b). It is, instead, a practice that directly affects both wholesale and retail rates. The NGA's plain language provides that when it comes to such practices, FERC's exclusive jurisdiction prevails.

1. Petitioners agree that there are some matters Section 1(b) reserves to the states, and in those areas there can be no field preemption. *See* Opening Br. 38.

But what Respondents' suits seek to regulate does not fall within those areas.[1]

Section 1(b) reserves to the states authority over the non-jurisdictional "sale of natural gas." 15 U.S.C. § 717(b). The Court has explained that this "proviso of § 1(b) withheld from [FERC] only rate-setting authority with respect to direct sales." *Federal Power Comm'n* v. *Louisiana Power & Light*, 406 U.S. 621, 638 (1972). FERC therefore is "fence[d] off" from setting rates in retail transactions, just as it was fenced off in *Northwest Central* from dictating timing of production by natural-gas producers. 489 U.S. at 511. These limitations coexist comfortably with this Court's direct-effect test: FERC has exclusive authority to regulate practices that directly affect jurisdictional rates, but FERC may not use that authority to regulate things that the NGA says only states may regulate.

But what Respondents' suits seek to regulate is not retail transactions *per se*—a reality underscored by the fact that many of the Petitioners they seek to punish did not even *engage* in retail transactions with any Respondent. *See* J.A. 246-249. Respondents' suits instead seek to regulate *practices* by jurisdictional gas companies that would *affect* retail and wholesale rates alike. Indeed, Respondents effectively concede as much by asserting that their suits would regulate "matters" that "arise from" retail transactions, rather than retail transactions themselves. Learjet Br. 17, 25;

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[1] Respondents say Petitioners "do not dispute" that their claims "implicate 'the jurisdictional provisions of Section 1(b).'" Learjet Br. 25 (citation omitted). Not true. The whole point of Petitioners' opening brief was that though Respondents claim their suits operate in the state field, they in fact regulate in the NGA-occupied field. Opening Br. 23-29, 38.

see infra at 9-12 (discussing Respondents' "arise from" test).

That is a key concession, and a key difference, because the NGA carefully distinguishes between rates on the one hand and practices affecting rates on the other. The NGA gives FERC jurisdiction over wholesale rates in Section 1(b), 15 U.S.C. § 717(b), and it separately gives FERC jurisdiction over practices affecting such rates in Section 5(a), *id.* § 717d(a). By contrast, the NGA gives states jurisdiction over retail rates in Section 1(b), but reserves to them no separate statutory authority over *practices affecting* such rates. *See id.* § 717(b); INGAA Br. 16-17.

The NGA thus settles the issue of jurisdiction over practices that affect wholesale and retail rates alike: Congress explicitly gave FERC jurisdiction over such practices; it made FERC's jurisdiction exclusive where it exists; and it chose *not* to include such practices within the area reserved for state control. That decides this case. No one disputes that the alleged index-manipulation practices affect wholesale and retail rates in the same way.[2] FERC accordingly concluded it has jurisdiction to regulate those practices. Opening Br. 9-10. That conclusion is entitled to *Chevron* deference, *infra* at 24-25, and is correct. As the District Court concluded, it would "have little trouble rejecting

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[2] Respondents now run from the fact that index manipulation is at issue; instead, they claim they alleged collusion in the abstract, Wisconsin Br. 14, or a specific conspiracy to manipulate *retail* prices in particular, Learjet Br. 38. Neither recharacterization is accurate. Instead, relying heavily on FERC's investigation of how index manipulation may have affected the jurisdictional market, the complaints allege collusion to *manipulate indices*, and actual manipulation of those indices—the very practice FERC regulates. *See infra* at 21-25.

a challenge to FERC's jurisdiction to prohibit jurisdictional sellers" from manipulating indices because indices "are the method by which jurisdictional rates are set." Pet. App. 111a.

That distinguishes *Northwest Central*. *Northwest Central* addressed a matter—the timing of producers' natural-gas production—indisputably within the states' reserved Section 1(b) authority over the "production and gathering" of natural gas. 489 U.S. at 513. FERC thus was "fence[d] off" from regulating. *Id.* at 512. By contrast, Respondents seek to regulate behavior that is *not* within the states' reserved authority, and FERC has jurisdiction to, and did, regulate that behavior. *Northwest Central* has no application.

This case also differs from *Northwest Central* in a second critical respect: In *Northwest Central*, the state's regulation was "directed to" the behavior of state-regulated gas producers, not FERC-regulated interstate pipelines. 489 U.S. at 512. To the Court that was dispositive. It explained that in *Northern Natural*, *Schneidewind*, and *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986) (*Transco*), state regulations were preempted because they were " 'unmistakably and unambiguously directed at' " FERC-regulated interstate pipelines and interstate gas companies. *Northwest Central*, 489 U.S. at 513 & n.10 (citation omitted). Thus, the state had " 'invalidly invade[d] the federal agency's exclusive domain.' " *Id.* (citation omitted; alteration in original). The state regulation in *Northwest Central* was different, and not preempted, because it was "directed to the behavior of gas producers"—a group regulated by the states. *Id.* at 512.

Here, Respondents' lawsuits are "directed at" behavior of jurisdictional gas companies that affected jurisdictional rates. *Id.* at 513. They accordingly "amount[] to a regulation" of matters within FERC's sphere. *Schneidewind*, 485 U.S. at 307. *Northwest Central* confirms that such state regulation is not insulated by Section 1(b).

2. Unable to take shelter under Section 1(b) as written, Respondents propose to expand that provision dramatically: They say it protects state authority not just over retail sales, but over all matters that "arise from," or "concern," retail sales. Learjet Br. 17-18; Wisconsin Br. 16-21.

That rule is spun from whole cloth. And it suffers from two fatal flaws.

First, it is inconsistent with the statutory text, which says retail *"sale[s]"* are reserved to the states, 15 U.S.C. § 717(b) (emphasis added), not everything "arising from" such sales. Petitioners' "arising from" test amounts to an effort to bring things that *affect* retail sales within Section 1(b). But that is not how the statute works. The NGA gives FERC jurisdiction over wholesale rates; it gives states jurisdiction over retail rates; and it gives *FERC* jurisdiction over practices affecting wholesale rates. "[C]ritically, there is no parallel provision reserving states similar jurisdiction over practices that affect nonjurisdictional rates." INGAA Br. 17. Respondents' theory thus seeks to flip the statute on its head. And it would undercut "the uniformity of regulation which was an objective" of the NGA, *Northern Natural*, 372 U.S. at 91-92, by authorizing any retail buyer to sue under state law anytime that buyer theorizes that some upstream event affected retail gas prices. INGAA Br. 19-20.

Second, Respondents' "arises from" rule is refuted by *Northwest Central* itself. *Northwest Central* explained that the state regulations before it, and those at issue in *Northern Natural* and *Transco*, all concerned the same thing: efficient gas production. 489 U.S. at 497-489, 513. And Section 1(b) commits gas production to the states. Under Respondents' rule, then, none of the regulations should have been field-preempted; all "concern[ed] a matter that Section 1(b) reserves to states." Learjet Br. 18. But that was not the result. Instead, the regulation in *Northwest Central* escaped preemption because it was "directed at" natural-gas producers, but the regulations in *Northern Natural* and *Transco were* field-preempted because they were "directed at" FERC-regulated pipelines engaged in jurisdictional activity. 489 U.S. at 513. The regulations' targets and effects determined whether they were field-preempted, not what they "concerned" or "arose from."[3]

Respondents' "arising from" test likewise contradicts *Louisiana Power*. There, a utility brought a state-law breach-of-contract action against an interstate pipeline that curtailed retail deliveries. 406 U.S. at 625. The pipeline argued that the suit interfered with FERC's authority to regulate interstate natural-gas transportation, and the utility responded—like Respondents here—that Section 1(b)'s proviso "creates a complete exemption of direct sales." *Id.* at 637. This Court

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[3] Respondents rely on *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355 (1986). But the statute there granted *states* authority over "practices * * * in connection with intrastate communication services," allowing states priority when a practice affected both spheres. *Id.* at 370, 373. It was the inverse of the NGA.

disagreed. Even though the utility's contract claim *arose* from a retail sale, its suit intruded on FERC's exclusive power over interstate transportation. *Id.* at 641. The suit had to yield.

3. Respondents' proposed "arising from" test, in short, cannot be reconciled with the NGA's text or controlling precedent. That dooms their efforts to distinguish *Schneidewind* and *Mississippi Power*.

Respondents say *Schneidewind* did not "involve[] a state law operating in 'the field expressly reserved by the NGA to the States,' " whereas this case does because it "arises from" retail sales. Learjet Br. 24 (citation omitted). But "arises from" is not the test. Instead, the key point is that in both *Schneidewind* and this case, state law was being used to regulate a practice by jurisdictional gas companies that directly affected wholesale rates. *Schneidewind* holds that such a regulation is field-preempted. 485 U.S. at 306-309.

As for *Mississippi Power*, Respondents try a more complex gambit. They acknowledge that in *Mississippi Power* the state was trying to exercise its "undoubted jurisdiction over retail sales" but was preempted—a result inconsistent with their "arises from" test. Learjet Br. 24. They try to explain away that result by positing that *Northwest Central* created a "framework for dealing with overlaps in jurisdiction"—namely, when authority overlaps, state law is preempted only if it actually conflicts with federal law. Respondents then claim that *Mississippi Power* was only a *conflict* preemption case, "consistent with *Northwest Central*'s framework." *Id.* at 14, 24.

Both pieces of that theory are pulled from thin air. *First*, *Northwest Central* developed no "framework for

dealing with overlaps in jurisdiction"; it instead found that FERC had *no* jurisdiction. 489 U.S. at 512, 515. *Second, Mississippi Power* is a field-preemption decision. This Court wrote that "FERC's *exclusive jurisdiction* applies not only to rates but also to power allocations that affect wholesale rates"; that states must "give effect to Congress' desire to give FERC *plenary authority* over interstate wholesale rates"; and that Mississippi's "effort to *invade the province of federal authority* must be rejected." 487 U.S. at 371, 373, 377 (emphases added). That is field-preemption language. And Justice Scalia's concurrence explained that "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Id.* at 377. Respondents accuse us of "fixating" on that statement, Learjet Br. 24-25, but as Justice Scalia recognized, the principle was "common ground" with the majority, 489 U.S. at 377.

This is a case just like *Mississippi Power*, where a unitary practice affected wholesale and retail rates. Consistent with the NGA's text, this Court has confirmed that only the federal government has jurisdiction in that circumstance.

C. FERC's Exclusive Jurisdiction Preempts State Laws Of "General Applicability" Where Those Laws Are Used To Regulate Practices Affecting Jurisdictional Rates.

Respondents assert that where a state law is of "general applicability," a claim based on that law cannot be field-preempted. Learjet Br. 28-35; Wisconsin Br. 22; States Br. 9-11. Respondents made no such argument below, and it is simply wrong. No matter how "general" a state law is, it is preempted as applied if used to invade a federal field.

1. Respondents' argument rests entirely on exaggerating the import of a footnote in *Schneidewind*. The Court there found facially preempted a Michigan securities regulation aimed at gas companies. 485 U.S. at 306-309. The Court observed in passing that its holding did not mean more general state securities regulation was necessarily imperiled: "[O]ne area FERC does not exclusively control is 'securities law' in the traditional sense of the term. * * * [S]uch traditional 'securities regulation' is not FERC's direct concern." *Id.* at 308 n.11.

That, of course, is true. A securities issuer's false statement typically would not directly affect wholesale rates or any area reserved to FERC. But nothing in *Schneidewind*'s footnote remotely suggested a sweeping rule that *no* application of a generally applicable law can ever be field-preempted. Nor do the NGA cases bear that out. This Court held state-law breach-of-contract actions preempted in *Louisiana Power*, 406 U.S. at 641, and *Arkansas Louisiana Gas*, explaining that "the mere fact [parties] brought th[eir] suit under state law would not rescue it, for when [C]ongress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce,' " 453 U.S. at 580 (citation omitted).

Respondents' contrary rule would make little sense. One can easily imagine a state using a generally applicable statute to target things within FERC's exclusive jurisdiction—for example, a state agency purporting to regulate interstate gas transportation under the aegis of a generally applicable environmental law. There is no reason why field preemption should apply differently than it would if the state enacted a more specific statute. The question is simply whether the state and

federal laws "operate upon the same object." *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926).

This Court's non-NGA cases drive the point home. In *Kurns* v. *Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), for example, a tort plaintiff argued that " 'a preempted field does not necessarily include state common law.' " *Id.* at 1269 (citation omitted). The majority and concurrence rejected the argument. They wrote that the "scope of the agency's power under the" statute "determine[d] the boundaries of the preempted field," *id.* at 1270 (Kagan, J., concurring), and that "[t]hat categorical conclusion admits of no exception for state common-law duties," including common-law tort suits, *id.* at 1269 (majority op.); *accord Farmer* v. *United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 300 (1977) ("[I]t is well settled that the general applicability of a state cause of action is not sufficient to exempt it from pre-emption.").

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1982), on which Respondents rely, is inapposite. *Silkwood* held that tort remedies were not field-preempted because *Congress specifically intended to leave them in place. Id.* at 253-256. There is no such evidence here.

2. Respondents advance the related argument that "state antitrust claims fall outside the Act's field-preemptive reach." Learjet Br. 30-31. The answer is the same: The NGA does not *categorically* preempt state antitrust law, but it does field-preempt applications of state antitrust law that invade the federal field.

Respondents' contrary argument is as follows: "[T]he NGA does not displace federal antitrust law" and "state antitrust law only mirrors federal antitrust law"; accordingly, "there is no reason why the NGA should

preempt state antitrust law." Learjet Br. 31-32; States Br. 16. That argument ignores fundamental field-preemption principles. Even if state antitrust law was identical to federal antitrust law—and it is not, *see infra* at 16-17—it would still be preempted when it invades the NGA-occupied field. "Where Congress occupies an entire field * * * even complementary state regulation is impermissible." *Arizona* v. *United States*, 132 S. Ct. 2492, 2502 (2012). That is why this Court has held state antitrust law field-preempted in cases where federal antitrust law is not—a holding impossible under Respondents' theory. *See, e.g.*, *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 635 (1975) (federal antitrust law applied, but "it does not follow that state antitrust law may apply as well").

3. Finally, Respondents' lengthy argument that there is no conflict here, Learjet Br. 32-35, is irrelevant because Petitioners advance a field-preemption claim.

To be sure, several NGA field-preemption cases discuss the "imminent possibility of collision" between state and federal law. *E.g.*, *Schneidewind*, 485 U.S. at 310; *Northern Natural*, 372 U.S. at 92. But they do so not in service of a separate conflict-preemption analysis—no such argument was pressed in the cases just cited—but instead to "support" a field-preemption finding. *Schneidewind*, 485 U.S. at 310. That "imminent possibility" supports field preemption here, too, *see* Opening Br. 29-33, but it does not make this a conflict-preemption case.

Because this is a field-preemption case, Respondents' assertions about the consistency of state antitrust suits with federal natural-gas regulation are immaterial. Respondents' suits are preempted because they regulate in an NGA-occupied field, regardless of whether

they are consistent, parallel, or even helpful to FERC's regulation. *See Arizona*, 132 S. Ct. at 2502. It also makes no difference that states find antitrust laws a useful way to regulate the wholesale-rate-affecting practices of jurisdictional gas companies. States Br. 15-16. The Supremacy Clause does not give way "simply because [antitrust law] is a matter of special concern to the States." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982).

In any event, the assurances of Respondents and their *amici* that state antitrust suits are perfectly harmonious with uniform natural-gas regulation ring hollow. Although some states may hew to federal antitrust doctrine, there is no requirement they do so. *See Smith* v. *Bayer*, 131 S. Ct. 2368, 2377-78 (2011). And in fact " 'there is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene.' " Washington Legal Found. Br. 17 (citation omitted). That creates the risk of multiple, inconsistent state regulatory schemes governing matters Congress entrusted to FERC. *See* Opening Br. 31-32.

D. Respondents' Policy Concerns Are Baseless.

Respondents argue that preemption would allow jurisdictional companies to get away with manipulating indices; would make it impossible for retail purchasers to be compensated; and would create a regulatory gap during the relevant time period. Learjet Br. 47-48; Wisconsin Br. 24-27, 56-62; States Br. 7-9. Not so.

1. FERC has, and has exercised, substantial authority to regulate index manipulation. FERC revoked Enron's blanket market certificate due to index ma-

nipulation and related offenses, ending its ability to sell wholesale gas. 103 F.E.R.C. ¶ 61,343 (June 25, 2003). Moreover, FERC has asserted that it may order "disgorgement of unjust profits." 68 Fed. Reg. 66,332, 66,333-34 (Nov. 26, 2003). And Petitioners have paid millions to federal regulators to settle allegations similar to Respondents'. *See* J.A. 251, 254, 262.

Nor are retail purchasers left out in the cold. As Respondents admit, *they could have sued under federal antitrust law*. Learjet Br. 11-12; Wisconsin Br. 11. Indeed, Respondents belatedly tried to do so when the District Court found their state-law claims preempted. Pet. App. 40a-41a. The District Court properly rejected that bid as untimely, *id.*—a holding Respondents bemoan but do not challenge.

2. Respondents' assertions of a regulatory gap are similarly baseless. FERC has *always* had authority to regulate index manipulation by jurisdictional sellers that directly affects jurisdictional rates, and after the EPAct it can regulate such manipulation by other entities, too. Opening Br. 44-45. Federal antitrust suits likewise are available.

That distinguishes this case from *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 521-522 (1947), where ousting the states would have left *no* regulator—state or federal—in charge. Here, there is comprehensive regulation over the field; it is just not divided the way Respondents would prefer.[4]

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[4] Respondents' policy arguments also rely on exaggerated, and disputed, factual assertions. For example, Respondents and their *amici* say the "dramatic spike" in gas prices in 2000 "was the result" of index manipulation, Wisconsin Br. 6, but FERC found

II. RESPONDENTS' DIRECT-EFFECT ARGUMENTS ARE FORECLOSED AND MERITLESS.

Because FERC has exclusive jurisdiction to regulate practices that directly affect wholesale rates, this case should be over. Respondents conceded that index manipulation directly affects wholesale rates, the District Court resolved the issue against them, and Respondents waived the issue on appeal. Respondents nevertheless purport to challenge the direct-effect finding in this Court, minting several new arguments in the process. Each is meritless.

A. Respondents' Arguments Are Foreclosed.

1. Respondents' complaints repeatedly allege that "[d]efendants' conspiracy *directly affected prices for natural gas*," including gas "traded" in the wholesale market. J.A. 357, 412 (emphasis added). That is the opposite of what they now argue.

Nor was that a one-time concession. Respondents' expert admitted that "the prices that were the subject of the manipulation *are* the prices of natural gas in this country" and that the alleged index-manipulation practices had a "direct impact" on gas prices. J.A. 593-594 (emphasis added). Consequently, the District Court held that "[n]o genuine issue of fact remains that

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that the "root causes" of the crisis were "supply shortfalls and a fatally flawed market design," J.A. 85, not index manipulation. Respondents also assert, as if it were an established fact, that the alleged index manipulation saddled direct retail buyers with far higher gas prices. *E.g.*, Wisconsin Br. 6-7. But Petitioners submitted evidence, which Respondents never rebutted, demonstrating that misreporting had nowhere near the effects on published price indices that Respondents hypothesize. *See, e.g.*, Dist. Ct. Dkt. No. 1635 5-11; Dkt. No. 1668 ¶¶ 5-8, 11-23, 29.

such practices directly affect the jurisdictional rate." Pet. App. 110a.

2. Respondents' no-direct-effect argument is also waived. On appeal, Respondents did not challenge the District Court's direct-effect holding; rather, they argued the District Court was wrong to apply a direct-effect test at all, and should have applied a "transaction-based analysis" instead. Learjet C.A. Opening Br. 39. Respondents thus waived any challenge below to the District Court's direct-effect finding. Having done so, Respondents cannot challenge that finding in this Court. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

The Learjet Respondents insist (Br. 36 n.7) they preserved the issue by referencing *American Gas Ass'n* v. *FERC*, 912 F.2d 1496 (D.C. Cir. 1990), in their Ninth Circuit briefs. In their opening brief below, however, the Learjet Respondents cited that case only for the proposition that the court should apply a transaction-based analysis and limit FERC's powers to " 'jurisdictional contracts.' " Learjet C.A. Opening Br. 36 (quoting *American Gas*, 912 F.2d at 1505). They did not challenge the District Court's direct-effect determination.

As for their reply brief, a reply cannot preserve an issue the opening brief waived. *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2251-52 (2011); *Joseph* v. *United States*, No. 13-10639, 2014 WL 2880493, at *1 (U.S. Dec. 1, 2014) (statement of Kagan, J., respecting denial of certiorari). And even if a reply brief could so do, Respondents' brief did not. It included a single sentence arguing that the effects of index-manipulation practices were " 'attenuated.' " Learjet Br. 36 n.7. That lone statement—made in passing while arguing

that the District Court should have applied a transaction-based analysis, *see* Learjet C.A. Reply Br. 4—is not enough to preserve appellate review of the District Court's factual finding because "[a]rguments made in passing and inadequately briefed are waived." *Maldonado* v. *Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009). Having waived the argument below, Respondents cannot raise it here. Indeed, this Court granted certiorari on the very premise that Respondents' "state-law claims challeng[e] industry practices that directly affect the wholesale natural gas market." Pet. i.

B. In Any Event, Respondents' Challenge To The District Court's Direct-Effect Determination Fails.

Even if the District Court's direct-effects finding were before this Court, Respondents have offered no reason to disturb it.

1. The undisputed evidence establishes that index-manipulation practices directly affected jurisdictional rates. As the District Court correctly concluded, there was no dispute that "jurisdictional rates were set at index," and Respondents presented "no evidence" to the contrary. Pet. App. 111a n.19; *see E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1032 (9th Cir. 2007) ("most of the transactions subject to FERC's jurisdictional authority" were pegged to indices); Learjet C.A. Opening Br. 12 (conceding indices were "used to set the price in jurisdictional transactions"). FERC concluded the same. Pet. App. 111a-112a; J.A. 150.

2. Respondents nonetheless advance various contrary arguments, most for the first time in this Court. Each is baseless.

a. Respondents say their suits are aimed at the "practice of conspiring to inflate prices in *retail* trans-

actions," and that that practice has no effect, direct or otherwise, on *wholesale* rates. Learjet Br. 38 (emphasis added); Wisconsin Br. 23. That is a bid to reframe the case at the eleventh hour. The record is devoid of evidence of a retail-only conspiracy, and Respondents have never claimed—until now—that such a conspiracy might exist. Instead, their complaints alleged a conspiracy to manipulate indices generally—a conspiracy directly affecting wholesale *and* retail rates. *See, e.g.*, J.A. 301 (alleging an "agree[ment] to report their false trades to the industry publications"); J.A. 357 (alleging a scheme to deliver "false * * * information * * * in an attempt to skew the price indices and, thus, the price of natural gas"); *id.* (alleging a scheme to report false information "to manipulate the natural gas price indices"). Nor did FERC identify or even suggest a retail-only conspiracy. The FERC report on which Respondents rely so heavily instead found that Petitioners attempted to manipulate indices, which would affect rates generally. *E.g.*, J.A. 88-89. Indeed, the nearly 200 pages of FERC staff reports in the Joint Appendix do not once use the word "retail." J.A. 84-240. There is no support for the idea that there was specific collusion to manipulate *retail* prices.

The Wisconsin Respondents advance a similar argument: that their claims are not directed at the federal field because they target *collusion*, not index manipulation. Wisconsin Br. 14, 21-24. Nonsense. Respondents do not allege collusion in the abstract; they allege collusion *to manipulate indices*, and successful manipulation of those indices. That is why Respondents' complaints discuss index manipulation, the effects of index manipulation, and FERC's index-manipulation findings on practically every page. *See* J.A. 240-313, 318-367. Even the Learjet Respondents admits the

case is about companies allegedly "conspir[ing] with one another *to manipulate the indices*." Learjet Br. 8 (emphasis added). The District Court was correct that Respondents "cannot prevail" without showing that Petitioners "collusively manipulated the price indices." Pet. App. 115a. The pieces cannot be separated.

b. Respondents also contend that "many" transactions reported to the indices "concerned sales (or supposed sales) outside of FERC's jurisdiction." Learjet Br. 39. Even if that were true,[5] it is irrelevant. The question is not whether FERC has jurisdiction over the *sales* being reported. It is whether FERC has jurisdiction over Petitioners' conduct in reporting those sales—that is, whether their reports directly affected jurisdictional rates. The nature of the underlying sales is immaterial. Whether gas is sold at wholesale or retail, the sale price is compiled into a common index. Thus, because jurisdictional rates are pegged to the index, false reports of either wholesale or retail sales will directly affect jurisdictional rates. *See* U.S. Br. 27.

c. Respondents next contend that the effect of index reports on wholesale rates is not direct because it "stemmed only from petitioners' intervening choice to reference index prices in their own wholesale contracts." Learjet Br. 39, 45-46. That is incorrect in two respects. *First*, when parties use indices in wholesale contracts, they peg the sale price to some specified index published *in the future*. The decision to use an index price is made by the parties before the index price is published. *See* J.A. 640-641. Thus, the effect of any ensuing index manipulation on the wholesale

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[5] FERC determined that it "has jurisdiction over most of the transactions that form the basis of the indices." J.A. 150.

rate is automatic; there is no "intervening" force. *Second*, it is not true that the effect of alleged index-manipulation practices was limited to Petitioners' "own wholesale contracts." Learjet Br. 39. The Ninth Circuit has observed that "most of the transactions subject to FERC's jurisdictional authority" were pegged to indices, *Gallo*, 503 F.3d at 1032, and FERC's survey of natural-gas companies confirmed the same. FERC received responses from *180* companies—far beyond the Petitioners here—and those companies priced "somewhere between 50 and 75 percent of their natural gas sales and purchases based on some form of natural gas index." FERC, *Report on Natural Gas and Electricity Price Indices* 25 (May 5, 2004), Dist. Ct. Dkt. No. 1882-28.

In any event, *Schneidewind* and *Northern Natural* rebut Respondents' view of what constitutes a "direct" effect. In *Schneidewind*, the Court held that a natural-gas company's capitalization directly affects rates, even though other factors inevitably influence the price of each sale. 485 U.S. at 308. And in *Northern Natural*, the Court held that a company's "purchasing patterns" bear an "intricate relationship" with the rates it eventually charges, even though other factors inevitably influence the resale price. 372 U.S. at 92. The effect here is far more immediate.

4. Finally, if there were any doubt that index-manipulation practices directly affect wholesale rates, FERC's exercise of its jurisdiction resolves it. Opening Br. 21-22; U.S. Br. 32-35. FERC promulgated a Code of Conduct expressly prohibiting jurisdictional sellers from manipulating price indices, 68 Fed. Reg. at 66,324-337, and concluded that it had jurisdiction over index manipulation even before the Code issued, *see* 107 F.E.R.C. ¶ 61,174, ¶¶ 61,688-90 (May 19, 2004);

U.S. Br. 6. As the Solicitor General explains (Br. 34), FERC's interpretation of its jurisdiction should be given broad deference and upheld because it represents a reasonable reading of the NGA. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1871-73 (2013). Respondents' state-law actions fall within FERC's jurisdiction, as interpreted by FERC itself, and are preempted.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
FREDERICK LIU
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

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SUPPLEMENTAL BRIEF

No. 13-271

IN THE
Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

[additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional counsel:

DOUGLAS R. TRIBBLE
KEVIN M. FONG
PILLSBURY WINTHROP
SHAW PITTMAN LLP
Four Embarcadero Center,
22nd Floor
San Francisco, CA 94105
(415) 983-1000

MICHAEL J. KASS
VLP LAW GROUP LLP
739 Calmar Avenue
Oakland, CA 94610
(510) 629-6089

Counsel for the defendant Dynegy entities

MARK E. HADDAD
MICHELLE B. GOODMAN
NITIN REDDY
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the defendant CMS entities

JOSHUA D. LICHTMAN
FULBRIGHT &
JAWORSKI L.L.P.
555 South Flower Street,
Forty-First Floor
Los Angeles, CA 90071
(213) 892-9200

Counsel for Shell Energy North America (U.S.), L.P.

AARON STREETT
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for GenOn Energy, Inc.

ROXANNA A. MANUEL
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
865 S. Figueroa St., 10th
Floor
Los Angeles, CA 90017
(213) 443-3000

Counsel for Shell Energy North America (U.S.), L.P.

OLIVER S. HOWARD
AMELIA A. FOGLEMAN
CRAIG A. FITZGERALD
GABLE GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103-4217
(918) 595-4800

Counsel for the defendant ONEOK entities

BRENT A. BENOIT
STACY WILLIAMS
LOCKE LORD LLP
3400 J.P. Morgan Chase Tower
600 Travis
Houston, TX 77002
(713) 226-1200

Counsel for El Paso LLC

SARAH JANE GILLETT
HALL, ESTILL, HARDWICK, GABLE, GOLDEN, & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, OK 74103-3706
(918) 594-0400

Counsel for the defendant Williams and WPX entities

MICHAEL JOHN MIGUEL
KASOWITZ BENSON TORRES & FRIEDMAN LLP
2029 Century Park East
Suite 750
Los Angeles, CA 90067
(424) 288-7900

Counsel for e prime, Inc.

STEVEN J. ROUTH
ORRICK, HERRINGTON, & SUTCLIFFE, L.L.P.
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for the defendant AEP entities

JOEL B. KLEINMAN
ADAM PROUJANSKY
LISA M. KAAS
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, D.C. 20006
(202) 420-2200

Counsel for Duke Energy Trading and Marketing, L.L.C.

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INTRODUCTION

The United States agrees the Ninth Circuit's preemption analysis went off the rails. In the Solicitor General's words, the Ninth Circuit broke from this Court's teaching that the Natural Gas Act (NGA) "has preemptive force" when a state law has the effect of regulating in the federal field, no matter the law's "nominal subject." U.S. Br. 13. Ignoring this directive, the Ninth Circuit wrongly ousted the Federal Energy Regulatory Commission (FERC) from its role as exclusive regulator of the practices targeted by Respondents' state-law suits. U.S. Br. 11.

But after 18 pages detailing this error, the United States pivots and recommends the Court deny review. Like many a compromise, the reasons behind this position do not withstand scrutiny, and indeed contradict one another. First, the United States seizes on irrelevant factual distinctions to maintain there is no split between the Ninth Circuit and the Tennessee and Nevada Supreme Courts. But the cases squarely align on the only fact that mattered below: whether plaintiffs bought gas at retail. Second, perhaps hoping to protect the United States from the consequences of the Ninth Circuit's decision, the Solicitor General strains to confine the opinion to its facts. Unfortunately, the court's bright-line, transaction-based preemption analysis cannot be read so narrowly. It authorizes (indeed, invites) the 50 States to compete with FERC to regulate a host of practices beyond index manipulation. That regulatory chaos will impede the energy industry's orderly growth, in this case alone spawning protracted litigation with billions of dollars at stake.

It has been a quarter century since the Court opined on NGA and Federal Power Act (FPA) preemption. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988). The Ninth Circuit's refusal to follow *Schneidewind* requires correction to avoid undermining regulation of the gas and power markets, hotbeds of innovation critical to the U.S. economy.

The writ should be granted.

ARGUMENT

I. THE UNITED STATES AGREES THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The United States confirms that the Ninth Circuit's decision "conflicts with relevant decisions of this Court." S. Ct. R. 10(c). This is "one of the strongest possible grounds" for certiorari, S. Shapiro *et al.*, *Supreme Court Practice* § 4.5, p. 250 (10th ed. 2013)—a point the government seemingly overlooks.

As the Solicitor General emphasizes, "this Court has looked to the effect of a state law, not its nominal subject, to determine whether the NGA has preemptive force." U.S. Br. 13. The Ninth Circuit did exactly the opposite, focusing single-mindedly on Respondents' retail transactions, rather than on whether their lawsuits would effectively regulate conduct subject to FERC's jurisdiction. That approach conflicts with *Schneidewind*, which held that state law is field-preempted if it is "directed at * * * precisely the things over which FERC has comprehensive authority," even if the regulation addresses a subject otherwise committed to state jurisdiction. U.S. Br. 14 (quoting *Schneidewind*, 485 U.S. at 308). And it contradicts this Court's instruction that "practices * * * 'affecting' the jurisdictional rate are

not themselves limited to the jurisdictional context." U.S. Br. 12 n.1 (quoting *FPC* v. *Conway Corp.*, 426 U.S. 271, 281 (1976)).

As the United States explains (at 14-15), the Ninth Circuit also misunderstood *Northwest Central Pipeline Corp.* v. *State Corporation Commission*, 372 U.S. 84 (1963). It thought *Northwest Central* supported its "narrow[]" interpretation of FERC's authority, Pet. App. 29a, but the case "establish[ed] only that the practices regulated by FERC" must "have a direct effect, not an incidental effect, on jurisdictional gas rates." U.S. Br. 14. Under the Ninth Circuit's rule, however, that direct effect is irrelevant if plaintiffs purchased gas at retail.

This Court routinely grants certiorari when a lower-court opinion "appears to be inconsistent with prior decisions of this Court." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 926 (1982). It should do so again here.

II. THE NINTH CIRCUIT'S DECISION SPLITS WITH THE TENNESSEE AND NEVADA SUPREME COURTS.

Although the United States agrees the Ninth Circuit erred, it tries to minimize the conflict with *Leggett* v. *Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010) and *State ex rel. Johnson* v. *Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), cert. denied, 133 S. Ct. 2853(2013). U.S. Br. 18-21. The split is real.

1. The United States ignores that *Leggett* and *Johnson* acknowledged the split. Both expressly rejected the Ninth Circuit's reasoning in *E. & J. Gallo Winery Corp.* v. *EnCana Corp*, 503 F.3d 1027 (9th Cir. 2007). *Leggett*, 308 S.W.3d at 871-872;

Johnson, 289 P.3d at 1193. And the Ninth Circuit thought *Gallo* controlled this case. U.S. Br. 8-10. *Leggett* and *Johnson* therefore necessarily reject the decision below.

2. That leaves the United States parsing the opinions in search of some distinction. U.S. Br. 18-20. Its effort fails.

As to *Leggett*, the United States acknowledges that the plaintiffs argued their index manipulation claims were not preempted because they arose out of non-jurisdictional transactions—the same argument Respondents make here. U.S. Br. 18-19. The United States further recognizes that the Tennessee Supreme Court " 'simply disagreed' with the plaintiffs' contention that their status as retail customers" made any difference. U.S. Br. 19 (quoting *Leggett*, 308 S.W.3d at 872). But the United States nevertheless suggests that *Leggett* can be distinguished because the plaintiffs purchased gas from utilities that had acquired the gas in upstream wholesale transactions. U.S. Br. 18-19.

There is just one problem: Not a word in the Ninth Circuit's decision indicates that makes any difference. As the Ninth Circuit saw things, "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction"—period. Pet. App. 28a. Under that bright-line rule, it does not matter if there was some *prior* wholesale transaction that the retail purchasers' suit will effectively regulate. The Ninth Circuit allows the suit to proceed if the *plaintiff's* particular transaction was non-jurisdictional.

Leggett was part of this very case when it was filed. Pet. 12. And while the Tennessee high court recog-

nized that state-law suits may "intrude upon the federal domain, even if the [plaintiffs'] transactions * * * fell outside the scope of the NGA," 308 S.W.3d at 872, the Ninth Circuit circumscribed the federal domain to exclude any conduct "associated with transactions falling outside of FERC's jurisdiction." Pet. App. 24a. That is a square split.

The United States fares no better trying to distinguish *Johnson*. Its discussion gives the impression that the plaintiffs there purchased gas at wholesale. U.S. Br. 19-21 (asserting the transactions "fell squarely within FERC's jurisdiction"). But that is wrong: The *Johnson* plaintiffs were "*retail* purchasers" who claimed that index manipulation "caused them to pay higher *retail* prices for gas." Br. in Opp. 6, 13, No. 12-980, 2013 WL 2428988 (June 3, 2013) (emphases added). Indeed, they raised the same claim as Respondents: that "end consumers of natural gas" were injured because the retail prices they paid for gas were "tied to * * * [inflated] 'index' prices." Pet. for Certiorari, No. 12-980, 2012 WL 7037173, at *3-*4 (Dec. 26, 2012).

The government nevertheless seizes on Reliant's observation that the alleged *misconduct* in *Johnson* occurred in FERC-jurisdictional sales. U.S. Br. 20. But that refers to the transactions reported *to* the index, whereas the Ninth Circuit focuses on the transactions coming *out of* the index. The government recognizes the difference: "Respondents' argument that their state-law claims are not preempted is based on the non-jurisdictional nature of their *transactions* with petitioners, not the manipulation of non-jurisdictional sales information reported to the indices." U.S. Br. 17. Many of the index inputs in this case occurred in jurisdictional transactions,

just like in *Johnson*. But that is beside the point. What matters is index *outputs*—and as to those, the Ninth Circuit and the Nevada Supreme Court disagree on whether the NGA preempts retail plaintiffs' index-manipulation claims.

3. Stepping back, the government's myopic focus on factual minutia ignores the square methodological conflict among these decisions. The Ninth Circuit believes state antitrust law "complement[s]" the regulatory scheme. Pet. App. 27a. The Tennessee Supreme Court, in contrast, held that state antitrust law "is not 'complementary,' regardless of whether it shares other goals of federal legislation, because it conflicts with the federal policy of uniformity." *Leggett*, 308 S.W.3d at 869. The Nevada Supreme Court, too, warned that imposing "50 different sets of state rules concerning anticompetitive behavior" would create a "maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market." *Johnson*, 289 P.3d at 1193. These flatly divergent views will sow conflicting results in future NGA preemption cases if the Court does not intervene now. Br. of Washington Legal Found. (WLF) 13-14; Br. of Electric Power Supply Ass'n *et al.* (EPSA) 12-13.

III. THE NINTH CIRCUIT'S ERROR IS IMPORTANT.

A. The Ninth Circuit's Erroneous Holding Is Not Limited To Index Manipulation.

In what ultimately amounts to wishful thinking, the United States suggests the Ninth Circuit's flawed approach to preemption is "of limited prospective importance." U.S. Br. 21. It offers two reasons why: (1) regulatory oversight reduces opportunities for index manipulation going forward; and

(2) preemption analysis in future manipulation cases will implicate the Energy Policy Act of 2005 (EPAct), which grants FERC express authority to regulate that conduct.[1]

These arguments might carry some weight if the Ninth Circuit's preemption analysis were limited to index manipulation—though even then, the billions at stake counsel in favor of reviewing a decision the government agrees is erroneous. *See infra* at 9-10. But the Ninth Circuit's flawed understanding of NGA preemption did not turn on—and cannot be confined to—the particular conduct targeted by Respondents' state-law suits. The court's far broader rationale will wreak havoc in future preemption cases.

1. The critical feature of this case, in the Ninth Circuit's view, was not that it involved manipulation but that it was brought by retail purchasers. The court declared that its "preemption analysis [wa]s governed by * * * the distinction between categories of sales that fall within FERC's jurisdiction * * * and the categories of sales that fall outside of FERC's jurisdiction." Pet. App. 15a-16a. As the court saw things, suits challenging conduct "associated with * * * nonjurisdictional sales" are not preempted, even if the same conduct is simultaneously associated with wholesale transactions. Pet. App. 36a. The Ninth

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[1] The government mentions "significant changes in the regulatory environment," U.S. Br. 21, but FERC's jurisdiction over Petitioners' alleged index manipulation has not changed one bit. FERC had—and exercised—"exclusive authority" over those practices before the EPAct's enactment. U.S. Br. 10; *Amendments to Blanket Sales Certificate*, 68 Fed. Reg. 66,323 (Nov. 17, 2003) (*2003 Amendments*).

Circuit stated this bright-line, transaction-based rule in no uncertain terms and with no limiting principle: "[F]ederal preemption doctrines do not preclude state law claims *arising out of transactions outside of FERC's jurisdiction.*" Pet. App. 28a (emphasis added).

That is a breathtaking change in the law—and one with profound consequences. The Ninth Circuit's transaction-based limitation on NGA preemption will permit states to regulate *any* practice—not just index manipulation—that directly affects jurisdictional rates if retail rates are also affected. The United States comforts itself with the notion that a simultaneous effect on jurisdictional and non-jurisdictional sales is "unique." U.S. Br. 12, 16. But as *amici* explain, plaintiffs will easily find other practices that straddle the state/federal divide. WLF Br. 15; EPSA Br. 13.

To flesh out one example: FERC regulates various accounting practices, including how jurisdictional companies account for depreciation and allocate capital costs. *In re Entergy Servs., Inc.*, 137 FERC ¶ 61029, 2011 WL 4703181, at *13 (2011). Now, under the Ninth Circuit's rule, a plaintiff can oust FERC's exclusive authority by arguing that a particular depreciation or cost-allocation practice misstated a company's financial data, resulting in increased retail rates. The Ninth Circuit would permit this state-law suit because it challenges a "practice[] associated with * * * nonjurisdictional sales." Pet. App. 36a.

Or consider a suit premised on an interstate pipeline's decision to curtail capacity in response to equipment breakdowns or supply fluctuations that

leave it unable to satisfy its contractual commitments. FERC has authority to regulate pipeline-capacity reductions because they affect jurisdictional rates. *El Paso Natural Gas Co., Order on Reh'g*, 132 FERC ¶ 61155, 2010 WL 3328640 (2010). But they affect non-jurisdictional rates, too—and the Ninth Circuit thus would let retail purchasers enter the fray with state-law suits. EPSA Br. 12-13.

To give another example, FERC has rightly approved certain bona fide financial hedges that have a "legitimate business purpose." *2003 Amendments*, 68 Fed. Reg. 66,323, ¶ 41. But even if a particular hedge would pass muster with FERC, the Ninth Circuit's rule paves the way for retail purchasers to argue that they paid higher prices because a hedge was unfair in violation of state law. WLF Br. 16.

In short, "[p]laintiffs' attorneys will have no trouble finding an economist who, for a fee, will gladly testify that the alleged industry practice in question * * * impacts both wholesale and retail rates alike." WLF Br. 14. Because the Ninth Circuit's transaction-focused approach to preemption is not linked to index manipulation and cannot be limited to this case's facts, it will undermine FERC's exclusive control of any number of practices that affect both retail and wholesale prices.

Regulated entities are gravely concerned about this ruling—as the wide-ranging *amicus* participation here demonstrates—and the United States' mere hopes cannot stymie what 50 State Governments will do, or quell the industry's strong fears. Congress enacted the NGA and FPA to provide certainty to these critical industries, not subject them to the

whim of multiple regulators, who will force them to operate at the lowest common denominator.

2. Nor can the EPAct provide comfort. The United States observes that the Act will apply to future market-manipulation cases. U.S. Br. 23. But the EPAct does absolutely nothing to alter the preemption analysis for claims *not* related to manipulation—likely the lion's share of cases going forward, given the many ways regulated companies' practices impact retail prices. *See* EPSA Br. 12-13; WLF Br. 16. The Ninth Circuit's exceedingly narrow interpretation of FERC's authority thus poses a great potential for mischief in future cases.

Indeed, the Ninth Circuit's errors run so deep that the EPAct does not even resolve the problems with *this* case. If Respondents' claims arose today, the court still would find no preemption. The EPAct expands FERC's jurisdiction to include "any entity" that engages in manipulation, U.S. Br. 23, but jurisdictional sellers like Petitioners were already covered. And although the EPAct requires a nexus between the fraudulent conduct and jurisdictional transactions, *id.*, the Ninth Circuit would deem that nexus irrelevant when retail purchasers bring claims, just as it ignored the direct effect on wholesale transactions here. All that matters to the Ninth Circuit is a fact the government buries in its Statement: the EPAct does "*not expand[] the types of transactions subject to the Commission's jurisdiction under the NGA.*" U.S. Br. 6 (internal quotation marks omitted; emphasis added).

In other words, the EPAct does not alter the state/federal division between retail and wholesale transactions. The Ninth Circuit's transaction-based

preemption analysis thus survives the EPAct unscathed: The court would permit retail purchasers to target index manipulation today, as before, because those "claims aris[e] out of transactions outside of FERC's jurisdiction." Pet. App. 28a.

B. The Ninth Circuit's Erroneous Ruling Will Result In Years Of Needless Litigation With Billions At Issue.

Moreover, the United States completely ignores the tremendous *present* consequences of the Ninth Circuit's decision.

1. There are billions of dollars in controversy in this litigation. Pet. 25. The Wisconsin Respondents, for example, invoke state-law remedies that eschew actual damages and instead authorize recovery of the *entire amount* paid for gas by a class comprising thousands of purchasers over several years. D. Ct. Dkt. No. 1846 at 2, 55-56. Just for *one* of those years, for *one* state, the Wisconsin Respondents allege gas sales totaling $1.75 to $3.5 billion. *Id.* at 3.

That is just the tip of the iceberg. The Learjet Respondents invoke a Kansas law that similarly authorizes full refunds. D. Ct. Dkt. No. 1857 at 33; Kan. Stat. Ann. § 50-115. And yet another class is seeking treble damages under Missouri's antitrust statutes. D. Ct. Dkt. No. 1863 at 32-33, 38. Taken together, Respondents' claims are staggering.

The United States does not even acknowledge the billions in dispute. But when its own money is on the line, it has argued "that enormous monetary stakes count as a significant reason to grant certiorari." Reply Br. for Petitioners, *U.S. Dep't of Interior v. Kerr-McGee Oil & Gas Corp.*, No. 09-54, 2009 WL

2943389, at *9 (Sept. 11, 2009). And this Court has agreed. *See, e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Mitchell*, 463 U.S. 206, 211 n.7 (1983).

That principle applies equally to private petitioners. *See Supreme Court Practice* § 4.13, p. 269-270; *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., statement respecting denial of certiorari) ("[E]normous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari."). Indeed, the Court has previously granted review in an NGA case "in light of the economic interests at stake." *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Dist. Cos.*, 498 U.S. 211, 214-215 (1991). It should follow suit here.

2. Review is also warranted to prevent years of needless additional litigation. The United States agrees these cases should not proceed at all, and yet the Ninth Circuit's decision necessitates merits discovery, consideration of pending class-certification motions, preparation of expert reports, pre-trial motion practice, and—eventually—trials in six different district courts. This Court should intervene now to short-circuit such protracted proceedings and restore certainty to these highly-regulated national markets. This case squarely presents the issues, and additional record development cannot further illuminate the question presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
ROBERT B. WOLINSKY
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

June 2014

SUPPLEMENTAL BRIEF

No. 13-271

In The
Supreme Court of the United States

In Re Western States Wholesale
Natural Gas Antitrust Litigation

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

JENNIFER GILLE BACON*
WILLIAM E. QUIRK
GREGORY M. BENTZ
ANTHONY BONUCHI
ANDREW J. ENNIS
POLSINELLI PC
900 W. 48th Place
Suite 900
Kansas City, Missouri 64112-1895
(816) 753-1000
(816) 753-1536 Fax
jbacon@polsinelli.com

Counsel for Respondents
**Counsel of Record*

[Additional Counsel Listed At End Of Brief]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

SUPPLEMENTAL BRIEF FOR RESPONDENTS

The Solicitor General correctly advises this Court to deny certiorari. Respondents file this supplemental brief to make three short points, lest this Court be misled by petitioners' response to the Solicitor General's brief.

1. There should be no doubt after the Solicitor General's filing that the Ninth Circuit's decision does not conflict with *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), or *State ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186 (Nev. 2012), *cert. denied*, 133 S. Ct. 2853 (2013). As the Solicitor General observes (U.S. Br. 20-21), the courts in those cases found preemption based on Section 1(b) of the Natural Gas Act, while here petitioners argue for preemption under Section 5(a). Since petitioners' assertions involve a different statutory provision in the Act, not analyzed by the Tennessee or Nevada Supreme Courts, these opinions cannot possibly conflict with the opinion below.

Notwithstanding the Solicitor General's accurate explication of the differences between the holdings in these three cases, petitioners continue to crop selected quotations from *Leggett* and *Johnson* to insist that "a square split" exists. Supp. Br. 5. The fervor of petitioners' contention in the face of plainly apparent proof to the contrary should give this Court pause before crediting *any* of the assertions in their filings. If petitioners are this eager to stretch the truth on an issue that is fully subject to this Court's

fact-checking, it is fair to wonder about the statements petitioners make on issues that this Court is less able to verify.

2. This Court should not be influenced by petitioners' suggestion (Supp. Br. 11) that "billions" are at stake here. As the Solicitor General confirms (U.S. Br. 17), and the petitioners have acknowledged, petitioners would be subject to federal antitrust law even if they were not subject to parallel state law claims. Accordingly, this is not the normal kind of preemption case in which the defendants' argument, if successful, would take them outside the scope of antitrust law. At most, this case involves whether the "highly unusual" conduct that is "unlikely" ever to give rise to another lawsuit in light of the newly changed statutory landscape (U.S. Br. 21-23) should generate antitrust liability under federal, as opposed to state, law. That choice-of-law question is hardly a matter of great practical importance.

3. Continuing to overclaim, petitioners assert that the Ninth Circuit's decision is a "breathtaking change in the law." Supp. Br. 8. The decision, however, nowhere says – as petitioners contend – that it turns solely on the fact that respondents purchased at retail. Instead, Judge Bea's decision for the court of appeals adopted a more nuanced reading of the Act, suggesting – in harmony with longstanding D.C. Circuit precedent – that FERC could regulate even retail conduct if the effect on jurisdictional rates were sufficient. *See* Pet. App. 31a-32a (finding persuasive the D.C. Circuit's conclusion that Section 5 applies to

activity involving jurisdictional sellers "directly governing the rate in a jurisdictional sale"). The panel simply concluded that the index reporting practice on the facts before it did not have a substantial enough effect on such rates to overcome the states' explicit authority over retail transactions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JENNIFER GILLE BACON*
WILLIAM E. QUIRK
GREGORY M. BENTZ
ANTHONY BONUCHI
ANDREW J. ENNIS
POLSINELLI PC
900 W. 48th Place
Suite 900
Kansas City, Missouri 64112-1895
(816) 753-1000
(816) 753-1536 Fax
jbacon@polsinelli.com

Counsel for Respondents
**Counsel of Record*

June 2014

ADDITIONAL COUNSEL

ROBERT L. GEGIOS
STEPHEN D. R. TAYLOR
RYAN M. BILLINGS
AMY IRENE WASHBURN
KOHNER, MANN & KAILAS, S.C.
4650 N. Port Washington Road
Washington Bldg., 2nd Floor
Milwaukee, WI 53212
(414) 962-5110

Counsel for the Wisconsin Respondents

DONALD D. BARRY
BARRY LAW OFFICES, LLC
DONALD D. BARRY, CHARTERED
5340 S.W. 17th Street
P.O. Box 4816
Topeka, Kansas 66604
(785) 273-3151

Counsel for Respondents Learjet, Inc. et al., Heartland Regional Medical Center, et al., Breckenridge Brewery of Colorado, LLC, et al., Arandell Corp., et al., Wisconsin System, Inc., et al., and Reorganized FLI, Inc.

ERIC I. UNREIN
FRIEDEN, UNREIN & FORBES, L.L.P.
555 S. Kansas Avenue, Suite 303
Topeka, KS 66603
(785) 354-1100

Counsel for Respondents Learjet, Inc. et al. and Reorganized FLI, Inc.

ISAAC L. DIEL
SHARP MCQUEEN, P.A.
6900 College Blvd., Suite 285
Overland Park, Kansas 66207
(913) 661-9931

Counsel for Respondent Reorganized FLI, Inc.

PHILIP M. BALLIF
DURHAM JONES & PINEGAR
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
(801) 415-3000

Counsel for Respondent Sinclair Oil Corporation

AMICUS CURIAE BRIEF

No. 13-271

In the Supreme Court of the United States

ONEOK, INC., ET AL., PETITIONERS

v.

LEARJET, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID L. MORENOFF
General Counsel
ROBERT H. SOLOMON
Solicitor
HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the Natural Gas Act, 15 U.S.C. 717 *et seq.*, preempts respondents' state-law antitrust claims targeting manipulation of privately published natural-gas price indices, when the manipulation directly affected wholesale rates for natural-gas sales, which the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate, 15 U.S.C. 717(b), 717d(a), but when respondents' purchases of natural gas from petitioners were not subject to FERC's jurisdiction under 15 U.S.C. 717(b).

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In the Supreme Court of the United States

No. 13-271

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns whether the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, preempts state-law antitrust claims based on misconduct that directly affects the price of wholesale sales of natural gas, where the entities engaging in such misconduct and the affected wholesale rates fall within the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC). Because this case directly implicates FERC's regulatory responsibilities, the United States has a substantial interest in the Court's resolution of the preemption issue. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

1. a. The NGA grants FERC authority to regulate defined segments of the natural-gas market. Section 1(b) of that Act (15 U.S.C. 717(b)) provides FERC with jurisdiction over (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale" (*i.e.*, wholesale sales), and (3) "natural-gas companies engaged in such transportation or sale." *Ibid.* The transportation, sales, and companies subject to such jurisdiction are referred to as FERC-"jurisdictional" transportation, sales, and entities (transporters and sellers). Cf. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 n.1 (1972). Section 1(b) also specifies that the NGA does not apply to "any other transportation or sale of natural gas," "the local distribution of natural gas," "the facilities used for such distribution," or "the production or gathering of natural gas." 15 U.S.C. 717(b). Those areas are generally left open to state regulation. See *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

FERC's jurisdiction over wholesale natural-gas sales includes authority to regulate the rates charged by natural-gas companies in such sales. See 15 U.S.C. 717c, 717d(a). In 1978 and 1989, Congress "substantially narrowed" that jurisdiction by removing "first sales" of natural gas from FERC's rate-setting authority. See *Amendments to Blanket Sales Certificates*, 68 Fed. Reg. 66,323, 66,325 (Nov. 17, 2003) (citing Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, and Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157). "[F]irst sales" are "sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distri-

bution company, or retail customer." *E. & J. Gallo Winery* v. *EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007) (*Gallo*); see 15 U.S.C. 3301(21) (defining first sale). Accordingly, "sales by pipelines, local distribution companies, and their affiliates [are not] first sales unless these entities are selling gas of their own production." *Gallo*, 503 F.3d at 1037.

FERC's rate-setting jurisdiction thus now "includes all sales for resale by interstate and intrastate pipelines and [local distribution companies] and their affiliates, other than their sales of their own production." *National Ass'n of Gas Consumers* v. *All Sellers of Natural Gas*, 106 F.E.R.C. ¶ 61,072, at 61,247, 61,248 (2004). This Court has held that, by removing first sales from FERC's jurisdiction, Congress intended to leave that field free from price regulation by both FERC and the States. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422-423 (1986).

In exercising its authority concerning rates under the NGA, FERC acts under Sections 4 and 5(a) of that Act (15 U.S.C. 717c, 717d(a)) to ensure that "any rate * * * charged[] or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission," is just, reasonable, and not unduly discriminatory or preferential. 15 U.S.C. 717d(a); see 15 U.S.C. 717c(a) and (b). FERC has the same Section 5(a) authority with respect to "any rule, regulation, practice, or contract affecting such rate." 15 U.S.C. 717d(a). In addition, Section 7 (15 U.S.C. 717f) requires all jurisdictional sellers to obtain a FERC-issued certificate before engaging in a jurisdictional sale, 15 U.S.C. 717f(c), and authorizes FERC to im-

pose in the certificate "reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. 717f(e).

This case concerns the scope of FERC's jurisdiction over such jurisdictional sellers and over "any * * * practice * * * affecting" "any rate" charged or collected by a jurisdictional seller in connection with "any * * * sale of natural gas, subject to the jurisdiction of the Commission," 15 U.S.C. 717d(a).

b. Since 1992, FERC has issued blanket marketing certificates that authorize natural-gas companies to make wholesale sales at market-based rates, rather than at rates pre-filed with FERC, upon a finding that the company lacks market power. See 57 Fed. Reg. 57,952, 57,957-57,958 (Dec. 8, 1992); 57 Fed. Reg. 13,267, 13,270 (Apr. 16, 1992). During the time period at issue here (2000-2002), FERC's oversight of the market primarily consisted of that before-the-fact examination of market power, and the availability of a complaint process under 15 U.S.C. 717d(a).

Private entities publish indices of natural-gas prices that are intended to represent average natural-gas prices at different times and places. J.A. 124-125. Buyers and sellers in the natural-gas markets then use those indices as reference points to set prices for wholesale transactions within FERC's jurisdiction, and non-jurisdictional transactions (*i.e.*, retail sales and first sales). See Pet. App. 14a, 110a-112a & n.19; see *id.* at 106a (explaining that natural-gas sales contracts often use the indices "as a price term") (citation omitted).

This case arises from index-focused misconduct in the natural-gas market during the Western energy

crisis of 2000-2002—specifically, false price reporting to the entities that publish natural-gas price indices and "wash trades," *i.e.*, prearranged offsetting sales of the same product between two parties used to create a false price for use in the indices. Pet. App. 13a-14a; see 68 Fed. Reg. at 66,328-66,330 (describing wash trades). In 2003, FERC completed an investigation of manipulation in the natural-gas and electric markets during that 2000-2002 time period. See *Final Report on Price Manipulation in Western Markets*, Docket No. PA02-2-000 (F.E.R.C. Mar. 2003), http://www.ferc.gov/industries/electric/indus-act/wec.asp (*Final Report*) (partially reproduced at J.A. 84-239). The staff report identified five major traders, each a petitioner here, as having "admitted that their employees falsified information provided to" the index publishers. J.A. 88. The report determined that, as a result of those and other practices, "[s]pot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market." J.A. 85-86. The report explained that "the Commission has jurisdiction over most of the transactions that form the basis for the indices and many Commission-jurisdictional transactions (both gas and electric) are based on the indices." J.A. 150. The report recommended various reforms to FERC rules to "[en]sure that the published indices are accurate, not subject to manipulation, and not serving as a means for price manipulation." *Ibid.*; see J.A. 207-209 (recommendations).

FERC subsequently amended all blanket marketing certificates explicitly to prohibit jurisdictional sellers (*i.e.*, companies engaged in the sale of natural gas in interstate commerce for resale) from engaging in

"actions or transactions without a legitimate business purpose" to "manipulate market prices," including "wash trades" and "[c]ollusion." 68 Fed. Reg. at 66,323, 66,337 (18 C.F.R. 284.403(a) (2004)). Those amendments, referred to as the 2003 Code of Conduct, also require that jurisdictional sellers that report their natural-gas sales to publishers of price indices must "provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher." *Id.* at 66,337 (18 C.F.R. 284.403(b) (2004)); see also 18 C.F.R. 284.288(a) and (b) (code of conduct for unbundled gas sales service). FERC contemporaneously issued a policy statement setting forth standards intended to ensure a robust and accurate voluntary price-reporting regime. See *Policy Statement on Natural Gas and Electric Price Indices*, 104 F.E.R.C. ¶ 61,121, at 61,403 (2003), clarified, 112 F.E.R.C. ¶ 61,040, at 61,294 (2005); see *id.* at 61,404 (discussing wide use of price indices in natural-gas markets).

FERC explained that the original blanket certificates "implicitly prohibited acts which would manipulate the competitive market for natural gas," but that the Western energy crisis had made clear the need "to explicitly prohibit acts intended to manipulate the natural gas market." *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. ¶ 61,174, at 61,688, 61,690 (2004) (denying rehearing of the 2003 Code of Conduct). FERC further explained that it based the 2003 Code of Conduct on its finding that "the [Code's] prohibited practices are unjust and unreasonable" and that it therefore prohibited them expressly in blanket marketing certificates pursuant to its authority under "Sections 5, 7, and 16 of the NGA" (15 U.S.C. 717d,

717f, 717*o*). 107 F.E.R.C. at 61,690. Those provisions authorize FERC to regulate "any * * * practice * * * affecting" "any rate" charged or collected by a jurisdictional seller in connection with "any * * * sale of natural gas, subject to the jurisdiction of the Commission," 15 U.S.C. 717d(a); require jurisdictional sellers to obtain a FERC-issued certificate before engaging in jurisdictional sales, 15 U.S.C. 717f(c); and authorize FERC to issue orders, rules, and regulations to carry out its duties under the NGA, 15 U.S.C. 717*o*.

c. Congress subsequently passed the Energy Policy Act of 2005 (EPAct), Pub. L. No. 109-58, 119 Stat. 594, which, *inter alia*, amended the NGA to expressly prohibit market manipulation. See 15 U.S.C. 717c-1. That Act expanded FERC's enforcement authority to reach not only FERC-jurisdictional sellers, but "any entity" that, "directly or indirectly, * * * use[s] or employ[s], in connection with the purchase or sale of natural gas * * * subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance * * * in contravention of such rules and regulations as the Commission may prescribe." *Ibid.*; see 18 C.F.R. 1c.1 (implementing regulations for natural-gas market).

In promulgating its regulations implementing EPAct, FERC explained that although the new provisions did not expand "the types of transactions subject to the Commission's jurisdiction" under the NGA, they did expand the types of entities subject to FERC authority. *Prohibition of Energy Market Manipulation*, 71 Fed. Reg. 4244, 4247-4248 (Jan. 26, 2006). Under EPAct, FERC stated, "[i]f any entity engages in manipulation and the conduct is found to be 'in

connection with' a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority." *Ibid.* "[T]he 'in connection with' element," FERC explained, "encompass[es] situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction," such that an "entity engaging in a non-jurisdictional transaction" will "engag[e] in fraudulent conduct in connection with a jurisdictional transaction" if it acts intentionally or recklessly to affect the price of "jurisdictional transactions." *Id.* at 4249.[1]

2. Petitioners are natural-gas traders that engage in both FERC-jurisdictional wholesale sales (making them FERC-jurisdictional sellers) and non-jurisdictional retail and first sales of natural gas. Pet. App. 12a, 81a-102a. Respondents are industrial and commercial consumers of natural gas. *Id.* at 12a. As relevant here, respondents assert state antitrust claims seeking to recover damages arising from petitioners' alleged manipulation of the natural-gas market between 2000 and 2002. *Id.* at 12a-14a, 19a-21a, 67a-68a. Respondents contend that petitioners conspired to give false price information to the indices and engaged in wash trades, which artificially increased the price of natural gas in petitioners' non-jurisdictional retail and first sales to respondents. *Id.* at 12a-13a, 55a; J.A. 47.

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[1] FERC rescinded portions of its 2003 Code of Conduct that became "unnecessary" in light of EPAct and its regulations, *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 71 Fed. Reg. 9709 (Feb. 16, 2006), but kept in place regulations prohibiting false reporting to indices and requiring that price records be retained for five years. 18 C.F.R. 284.403.

a. In 2007, petitioners moved for summary judgment on the ground that the NGA preempts respondents' state-law antitrust claims. Pet. App. 22a. The district court initially denied petitioners' motions. J.A. 37-62. The court explained that, under Section 1(b), Congress granted FERC jurisdiction over "matters relating to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and the natural gas companies engaged in such transportation or sales." J.A. 44. The court concluded, however, that FERC's jurisdiction over *entities* engaged in jurisdictional sales "does not mean FERC has exclusive jurisdiction over those companies' conduct in non-jurisdictional transactions." J.A. 58-59. Thus, the court reasoned, to the extent respondents could show both that petitioners "engaged in misconduct in non-jurisdictional transactions" and that respondents were "harmed by purchasing natural gas in non-jurisdictional sales" involving natural-gas rates affected by that misconduct, respondents' state-law claims would not be preempted because FERC would "lack[] jurisdiction" over either the "manipulative conduct" or the "injury-causing sale." J.A. 55.

The district court subsequently granted reconsideration to address petitioners' argument that FERC's exclusive jurisdiction over their alleged misconduct rests not only on their status as jurisdictional sellers but also on FERC's authority under NGA Section 5(a) "to regulate any practice by a jurisdictional seller that affects a jurisdictional rate," Pet. App. 132a. See *id.* at 124a-136a. The court concluded that, under Section 5(a), FERC's exclusive authority extends to "any practice by a jurisdictional seller affecting a rate

charged or collected by a jurisdictional seller in connection with the transportation or sale of natural gas within FERC's jurisdiction," *id.* at 133a, if the practice "directly affect[s]" jurisdictional rates, *id.* at 134a-135a (citation omitted). The court thus held that respondents' claims would be preempted "if [petitioners] were jurisdictional sellers and their alleged practices of false price reporting and wash trades were practices which directly affected a jurisdictional rate," because such "practices fall within FERC's exclusive jurisdiction." *Id.* at 135a.

After further submissions, the district court granted petitioners partial summary judgment. Pet. App. 64a-123a. The court concluded that the undisputed evidence showed that petitioners were jurisdictional sellers, *id.* at 77a, 81a-102a, and that their alleged false price reporting and wash trades "directly affect[ed]" FERC-jurisdictional rates because FERC-regulated wholesale rates were "set by reference to the indices" that petitioners allegedly manipulated. *Id.* at 110a-112a; see *id.* at 106a-107a. The court accordingly held respondents' state-law antitrust claims preempted, *id.* at 115a, and entered final judgment on those claims under Fed. R. Civ. P. 54(b), see Pet. App. 13a n.2, 123a; J.A. 36.

b. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-63a. As relevant here, the court held that respondents' state antitrust claims are not preempted. *Id.* at 23a-39a.

i. The court of appeals did not disagree with the district court's evaluation of the summary judgment evidence. The court instead concluded that although Section 5(a) provides FERC with jurisdiction over practices "affecting" wholesale rates, that grant of

jurisdiction does not preempt state antitrust claims that "aris[e] out of price manipulation associated with transactions falling outside of FERC's jurisdiction." Pet. App. 24a. The court reasoned that preemption of respondents' claims would "conflict[] with Congress's express intent [in Section 1(b)] to delineate carefully the scope of federal jurisdiction" and to preserve state authority. *Ibid.*; *id.* at 32a-34a. The court concluded that Section 5(a) should be "narrowly" construed "to define the scope of FERC's jurisdiction within the limitations imposed by Section 1(b)." *Id.* at 29a.

ii. The court of appeals found support for its holding in its previous decision in *Gallo*. Pet. App. 25a-28a. In *Gallo*, the plaintiff brought federal and state antitrust claims against a natural-gas supplier, alleging that it had paid inflated prices due to the supplier's manipulative price reporting and wash trades that affected the price of natural gas reflected in the indices. 503 F.3d at 1030-1032. The defendant sought summary judgment on the ground that those claims were barred by the filed-rate doctrine (which precludes claims for damages that effectively alter a rate set or authorized by FERC, see *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 579-581 (1981)), and preempted. 503 F.3d at 1030.

The court of appeals in *Gallo* concluded that, under the filed-rate doctrine, "the market-based rate[s] for natural gas transactions under FERC's jurisdiction are FERC-authorized rates, and cannot be the basis of a federal antitrust or state damage action." 503 F.3d at 1043. The court further concluded, however, that the indices did not merely reflect FERC-authorized rates because they were partially composed of (1) fictitious and misreported rates and

(2) rates from non-jurisdictional sales. *Id.* at 1045. Thus, *Gallo* held that "to the extent the indices are comprised of rates that are not FERC-authorized rates" for either of those reasons, the filed-rate doctrine "does not bar [the] claim that such rates are unfair and led to unfair retail rates." *Id.* at 1048. The *Gallo* court also held that a plaintiff may "bas[e] damage claims" on manipulative reporting of first-sale transactions because, in its view, such antitrust claims "complement" Congress's goal of deregulating first sales. *Id.* at 1046.

The court of appeals here concluded that *Gallo*'s reasoning "applies with equal force to the question presented in this case." Pet. App. 28a. The court therefore concluded that "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction." *Ibid.*

iii. The court of appeals rejected petitioners' argument that FERC's promulgation of the 2003 Code of Conduct confirmed that FERC had jurisdiction over the price manipulation at issue here. Pet. App. 36a-39a. The court noted that Congress's 2005 enactment of EPAct prohibits market manipulation and authorizes FERC to promulgate regulations to protect natural gas purchasers. *Id.* at 37a. The court believed that EPAct's market-manipulation provisions would have been unnecessary if FERC already had regulatory authority over such manipulative conduct. *Id.* at 37a-38a. The court also noted that FERC limited the application of the 2003 Code of Conduct to sales within its jurisdiction, which in the court's view showed that FERC did not have jurisdiction over manipulative behavior related to non-jurisdictional sales. *Id.* at 38a.

SUMMARY OF ARGUMENT

The Natural Gas Act vests FERC with exclusive jurisdiction over, and "occupied the field of matters relating to[,] wholesale sales" of natural gas. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988). That authority includes the power to regulate "practice[s]" by jurisdictional sellers directly "affecting" the rates of FERC-jurisdictional wholesale sales, 15 U.S.C. 717d(a), and to impose upon jurisdictional sellers "reasonable terms and conditions as the public convenience and necessity may require," 15 U.S.C. 717f(e). As a result, FERC's "exclusive * * * jurisdiction" under Section 1(b) of the Act "extend[s] to" ensuring that "rates, and practices * * * affecting rates, are just and reasonable," *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 506 (1989), even if the rate-affecting practices are not themselves manifested during FERC-jurisdictional sales. Petitioners' state-law antitrust claims challenge practices—false reporting of natural-gas-sales rates to index publishers and wash trades—by jurisdictional sellers that directly affect FERC-jurisdictional rates. They therefore fall squarely within FERC's exclusive regulatory authority and are preempted.

The Ninth Circuit concluded that FERC's authority should be narrowly construed in light of Section 1(b)'s preservation of state authority over natural-gas sales other than wholesale sales. But first sales do not implicate any relevant state regulatory authority, and respondents' claims do not implicate Section 1(b)'s preservation of state rate-setting authority over retail sales. False reporting necessarily occurs after natural-gas sales, and wash sales constitute a practice that falls within FERC's, not the States', authority

over wholesale sales. But even if respondents' claims implicated some state authority, the claims would not be saved from preemption. Where, as here, practices by jurisdictional sellers *directly* affect jurisdictional rates, those practices fall within FERC's exclusive and comprehensive jurisdiction to regulate matters relating to wholesale natural-gas sales.

Even if the NGA were ambiguous on this point, FERC's pre-2005 conclusion that it possessed authority to regulate the conduct at issue here is reasonable and entitled to deference. The Ninth Circuit's contrary conclusion is based on a misunderstanding of FERC's 2003 Code of Conduct and on the mistaken view that EPAct's market-manipulation provisions would have been superfluous if FERC had possessed authority over the manipulative practices of jurisdictional sellers that respondents challenge.

ARGUMENT

THE NATURAL GAS ACT PREEMPTS RESPONDENTS' STATE ANTITRUST CLAIMS CHALLENGING MANIPULATIVE PRACTICES BY JURISDICTIONAL SELLERS THAT DIRECTLY AFFECTED NATURAL-GAS SALES WITHIN FERC'S EXCLUSIVE JURISDICTION

This case concerns the scope of FERC's pre-2005 authority under the NGA to regulate manipulative practices by jurisdictional sellers that directly affected the price of wholesale sales of natural gas within FERC's exclusive jurisdiction. In light of the nature of the Nation's "integrated gas supply system" and Congress's decision in the NGA to "divide[] regulatory authority between the States and the Federal Government," it is "inevitable that 'jurisdictional tensions will arise as a result of the fact that state and federally regulated elements coexist within a single integrat-

ed system.'" *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 515 (1989) (citation and brackets omitted). In this case, the asserted tension arises because of an unusual feature of the natural-gas markets in this case: The rates for natural gas in wholesale (jurisdictional) sales and other (non-jurisdictional) sales were often based on the *same* published price indices, which were themselves based on the sale prices that wholesale and other natural-gas market participants reported to the publishers.

Respondents' state-law antitrust claims are preempted because they seek to regulate the conduct of FERC-jurisdictional sellers that directly affected FERC-regulated wholesale natural-gas rates. When Congress passed the NGA, "Congress occupied the field of matters *relating to* wholesale sales * * * of natural gas in interstate commerce." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) (emphasis added). The NGA's grant of authority to FERC thus not only encompasses authority to regulate "any rate" charged or collected in a FERC-jurisdictional sale of natural gas, it also grants FERC authority to regulate "any * * * practice * * * affecting such rate." 15 U.S.C. 717d(a). Where, as here, alleged manipulative practices by jurisdictional sellers *directly affect* the rate charged in jurisdictional sales, FERC jurisdiction over those practices is exclusive, even if the practices do not themselves all arise from jurisdictional sales. The integrity of the Nation's natural-gas wholesale market depends on the reliability of natural-gas price indices and the prices reported thereto by market participants. The NGA grants FERC comprehensive authority to regulate manipula-

tive practices by jurisdictional sellers directly affecting that market. State laws that would also regulate the same wholesale-market-affecting practices of FERC-jurisdictional sellers would threaten the "[u]niformity of regulation" that Congress intended by enacting the NGA's "comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 419 (1986) (*Transco II*) (citations omitted). The state-law antitrust claims in this case would constitute such regulation and are therefore preempted.

A. FERC's Authority Under The Natural Gas Act Preempts Respondents' State-Law Antitrust Claims

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Where, as here, Congress has not expressly preempted state law, preemption will nevertheless occur if state law conflicts with federal law or "the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively." *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-1266 (2012) (brackets in original; citation omitted). Whether Congress intended field preemption turns on an interpretation of "the proper scope of the federal power" that Congress delegated to FERC in the NGA. See *New York* v. *FERC*, 535 U.S. 1, 18 (2002).[2]

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[2] Because the field-preemption claim in this case requires the Court to "interpret the [governing federal] statute to determine whether Congress has given FERC the power to act" and the "proper scope" of that federal power, this case turns on a normal

The broad text of the NGA, as interpreted by this Court, vests FERC with authority to regulate any manipulative "practice" by jurisdictional sellers directly "affecting" the rates charged in wholesale sales of natural gas, and preempts respondents' state-law claims.

a. Section 1(b) of the NGA grants FERC jurisdiction over "the sale in interstate commerce of natural gas for resale." 15 U.S.C. 717(b). That grant of authority "long has been recognized" by this Court as providing "a 'comprehensive scheme of federal regulation of "all wholesales of natural gas in interstate commerce"'" that "confers upon FERC exclusive jurisdiction over" those sales. *Schneidewind*, 485 U.S. at 300-301 (quoting *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 91 (1963)); see *Transco II*, 474 U.S. at 419. It thus is "well settled" that "Congress occupied the field of matters relating to wholesale sales * * * of natural gas." *Schneidewind*, 485 U.S. at 305.

FERC "exercises [its] authority" granted by Section 1(b) of the NGA "through a variety of powers," including those specified in Section 5 and Section 7. *Schneidewind*, 485 U.S. at 301; see *id.* at 302, 304. Section 5(a), as relevant here, authorizes FERC to regulate "*any* rule, regulation, practice, or contract affecting" "*any* rate * * * charged[] or collected by *any* natural-gas company in connection with *any* * * * sale of natural gas, subject to the jurisdiction of the Commission." 15 U.S.C. 717d(a) (emphases added). That broad statutory authorization grants

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exercise of statutory interpretation without a "presumption against pre-emption." *New York*, 535 U.S. at 17-18 (distinguishing such cases from conflict-preemption cases).

FERC regulatory power over the practices of jurisdictional sellers affecting wholesale rates "without qualification or exception." *Permian Basin Area Rate Cases*, 390 U.S. 747, 783-784 (1968); cf. *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach."). This Court has accordingly held that "[t]he rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context," at least when the entity involved is a FERC-jurisdictional entity. See *FPC* v. *Conway Corp.*, 426 U.S. 271, 281 (1976) (Federal Power Act decision following this Court's interpretation of NGA § 5(a) in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 646 (1945));[3] cf. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23-27 (1961) (*Transco I*) (holding that, notwithstanding "the bar in § 1(b)" prohibiting federal regulation of direct sales, the Commission may take action that adversely affects future "direct sales" based on its determination that "the effect [of] the inflated sales price charged in [such a non-jurisdictional direct] sale" would adversely affect the "future field prices" for both "direct sales and [jurisdictional] sales for resale").

Moreover, the breadth of FERC's jurisdictional authority under the NGA rests not only on Section 1(b)'s broad grant of federal authority over wholesale

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[3] Because the relevant provisions of the NGA and Federal Power Act "are in all material respects substantially identical," this Court follows the "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n. 7 (1981) (citation omitted).

(jurisdictional) sales, but also on that provision's "independent grant of jurisdiction" over the natural-gas companies that make such sales. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972). By separately and independently granting FERC authority over "natural-gas companies engaged in [FERC-jurisdictional] transportation or sale[s]," 15 U.S.C. 717(b), Congress established that FERC's authority over jurisdictional sellers is not rigidly confined to the FERC-jurisdictional transactions in which they engage. Among other things, Section 7 of the Act requires that a jurisdictional seller obtain a certificate from FERC before engaging in any jurisdictional sale, see 15 U.S.C. 717f(c), and thereby vests FERC with a "certification power," *Schneidewind*, 485 U.S. at 302-303, that includes authority to impose on jurisdictional sellers "such reasonable terms and conditions as the public convenience and necessity may require," 15 U.S.C. 717f(e). Section 7 thereby grants the agency "a wide range of discretionary authority" over jurisdictional sellers to address "all factors bearing on the public interest," including factors that affect "both * * * direct sales and sales for resale." *Transco I*, 365 U.S. at 7-8, 23 (citations and emphasis omitted).

FERC's "exclusive * * * jurisdiction" under Section 1(b) accordingly can "extend to * * * ensuring that rates, and practices * * * affecting rates, are just and reasonable," *Northwest Central*, 489 U.S. at 506 (citing 15 U.S.C. 717c, 717d), even if the rate-affecting practices are not themselves manifested during FERC-"jurisdictional" sales, see *Conway Corp.*, 426 U.S. at 281. Indeed, a "fundamental principle[] concerning the pre-emptive impact of federal jurisdiction over wholesale rates on state regula-

tion" is that "FERC's exclusive jurisdiction applies not only to rates but also to [factors] that affect wholesale rates." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988). That authority ensures that FERC possesses the jurisdiction commensurate with Congress's decision to grant it comprehensive regulatory authority over the Nation's natural-gas wholesale market and to prohibit unjust and unreasonable practices that directly affect wholesale rates.

Because petitioners' alleged manipulation of price indices directly affected the wholesale price of natural gas, the state-law claims in this case challenge "practice[s] * * * affecting" the rates charged by natural-gas companies in jurisdictional sales within the meaning of 15 U.S.C. 717d(a). Those practices by jurisdictional sellers thus were subject to FERC's exclusive authority to determine whether their practices affecting jurisdictional rates were just and reasonable, even if respondents contend that the practices also involved false reporting about non-jurisdictional trades and collusive wash trades.[4]

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[4] The district court concluded at summary judgment that petitioners' alleged false price reporting and wash trades "directly affect[ed]" FERC-jurisdictional rates because FERC-regulated wholesale rates are "set by reference to the indices" that petitioners allegedly manipulated, Pet. App. 110a-112a; the court of appeals did not disagree; and this Court granted certiorari to decide whether the NGA preempts state-law antitrust claims challenging practices that "directly affect the wholesale natural gas market," Pet. i. To the extent respondents contend that the summary-judgment evidence reflects a genuine issue of material fact about whether petitioners' alleged practices "directly affect[ed]" wholesale rates, that fact-bound contention should be resolved by the

b. That understanding of FERC's authority is consistent with this Court's decisions governing the preemptive effect of the NGA. In conducting preemption analysis, this Court has looked to the effect of a state law, not its nominal subject, to determine whether the NGA preempts state law, and it has set aside state regulations that intrude on FERC's exclusive authority to regulate wholesale natural-gas sales by regulating practices directly affecting those rates.

In *Schneidewind*, for example, Michigan sought to regulate long-term securities issued by natural-gas companies transporting gas into the State. 485 U.S. at 296-297. The Court concluded that, although the NGA does not "expressly authorize[] [FERC] to regulate the issuance of securities by natural gas companies," the State was prohibited from doing so. *Id.* at 304. The Court explained that when FERC determines a reasonable rate of return on invested capital for a natural-gas company, FERC may calculate the company's rates based on an imputed capital structure, rather than its actual capital structure, if the company's equity ratio moves beyond certain limits, in order "to limit the burden on ratepayers of abnormally high equity ratios." *Id.* at 302. Because Michigan's law would have permitted the State to prevent a natural-gas company from raising its equity levels above a certain point, thus "ensur[ing] that the company w[ould] charge only what Michigan consider[ed] to be a 'reasonable rate,'" the Court concluded that the state law was preempted. *Id.* at 308.

As relevant here, *Schneidewind* explained that FERC's Section 5(a) "authority to regulate and fix

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court of appeals on remand, which can consider in the first instance whether respondents have preserved that contention.

practices affecting rates allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments" because of the effect that such investments have on jurisdictional rates. 485 U.S. at 309; see *id.* at 304. *Schneidewind* further explained that FERC's Section 7 "certification power" over jurisdictional sellers enabled it to address the securities-related concerns addressed by the state law in question. *Id.* at 302-303, 309. And because FERC possessed such authority under those provisions to control a company's capital structure in connection with its determination of a reasonable natural-gas wholesale rate, the Court held the state law preempted because it "[wa]s directed at * * * precisely the things over which FERC has comprehensive authority." *Id.* at 308.

Similarly, in *Northern Natural Gas*, the Court held that the NGA preempted state measures designed to preserve the State's natural-gas resources, which ostensibly relied on the State's authority to regulate the natural-gas "production and gathering" activities that Section 1(b) preserves. 372 U.S. at 89, 93-94. Kansas had required that pipelines desiring to purchase gas from a particular gas field must purchase that gas ratably from all connected wells in the field. *Id.* at 85-86. Although the Court recognized the State's authority to adopt measures to preserve its natural resources (for which ratable extractions were important), the Court explained that the "particular means chosen by [the State] to exercise the conceded power" was problematic, because the State had imposed requirements "aimed directly at interstate purchasers and wholesales for resale," *id.* at 93-94, and thus "deal[t] with matters which *directly affect*

the ability of [FERC's predecessor] to regulate comprehensively" and "achieve the uniformity of regulation" intended by Congress, *id.* at 91-92 (emphasis added). "The federal regulatory scheme," the Court concluded, "leaves no room * * * for state regulations which would indirectly achieve the same result" as FERC's regulation of wholesale sales. See *id.* at 91 (citation omitted).[5]

"Of course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted." *Schneidewind*, 485 U.S. at 308. Such a result would stretch the NGA's grant of authority to FERC beyond any logical mooring. But if state statutory or other regulatory provisions "deal with matters which directly affect the ability of [FERC] to regulate comprehensively and effectively the * * * sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act," they "invalidly invade the federal agency's exclusive domain" under that Act. *Northern Natural Gas*, 372 U.S. at 91-92. In other words, a state provision that would "regulate[] in [the] field the NGA has occupied to the exclusion of state law * * * is pre-empted." *Schneidewind*, 485 U.S. at 300. Respondents' state-law antitrust claims are directed at false price reporting and wash trades by

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[5] The Court has followed a similar course in Federal Power Act cases. In *Mississippi Power & Light Co.*, for instance, the Court held that, even where the States legitimately act within the scope of their authority to set retail rates and conduct prudence reviews, "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." 487 U.S. at 371 (applying *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986)).

jurisdictional sellers, practices that directly affect wholesale rates within FERC's exclusive jurisdiction. Those claims are thus preempted.

FERC's jurisdiction over petitioners' manipulation of gas price indices to the exclusion of the States does not mean that federal antitrust laws would be displaced to the extent they otherwise would apply. See, *e.g.*, *Connell Constr. Co.* v. *Plumbers Local Union No. 100*, 421 U.S. 616, 635-637 (1975). Regulation under the NGA does not insulate companies from federal antitrust laws. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973) (stating that "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws" by enacting the NGA). Rather, this Court has held that in the relationship between the NGA and federal antitrust laws, "the rule is to give effect to both if possible." *California* v. *FPC*, 369 U.S. 482, 485 (1962) (citation omitted).

This Court has not determined whether a federal antitrust action in a context such as this would be barred by the filed-rate doctrine. The filed-rate doctrine prevents federal and state courts from intruding upon FERC's authority to determine the reasonableness of a rate. See *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 962-964 (1986). Since 1992, FERC's blanket marketing certificates have "authoriz[ed] sales for resale at rates negotiated in a competitive market environment," *i.e.*, "a truly competitive market" in which "market forces * * * balance the supply and demand for natural gas at [just and] reasonable prices." 57 Fed. Reg. 57,952, 57,953, 57,958 (Dec. 8, 1992). Thus, when jurisdictional sellers engage in market manipulation directly affecting juris-

dictional rates, they act beyond the scope of their FERC-issued certificate authorizing their sale of natural gas. See *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. ¶ 61,174, at 61,690 (2004) (certificates "implicitly prohibited acts which would manipulate the competitive market for natural gas"); cf. *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 554 (2008) ("[U]nlawful market activity that directly affects contract negotiations eliminates the premise" that the FERC-authorized contract rates were "the product of fair, arms-length negotiations.").

This Court has also not decided whether the filed-rate doctrine would preclude a state-law breach-of-contract claim arising from a contracting party's market-manipulating misconduct. Cf. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 579-580, 583-584 (1981) (barring contract claim challenging negotiated natural-gas rates but reserving question whether "affirmative misconduct" by a contracting party would warrant a different result). As this case comes to the Court, however, it does not involve the filed-rate doctrine or that doctrine's relationship to a federal antitrust or a state-law breach-of-contract action.

B. Section 1(b)'s Proviso Does Not Save Respondents' Claims From Preemption

The Ninth Circuit concluded that FERC's authority under Section 5(a) should be construed "narrowly" in light of "limitations imposed by Section 1(b)." Pet. App. 29a. Section 1(b) of the NGA grants FERC exclusive jurisdiction over "the field of matters relating to wholesale sales," *Schneidewind*, 485 U.S. at 305, while also containing a proviso that "expressly carves out a regulatory role for the States" in other

portions of the natural-gas industry. *Northwest Central*, 489 U.S. at 507. That proviso preserves a State's authority over direct (retail) "sale[s]" to end-users by specifying that the NGA "shall not apply to any other * * * sale of natural gas" beyond wholesale sales. 15 U.S.C. 717(b). This Court has accordingly concluded that the NGA's field-preemptive force should be interpreted in light of that proviso to avoid "nullify[ing]" its reservation of state authority. *Northwest Central*, 489 U.S. at 512, 514. But in this case, field preemption is consistent with the Congress's preservation of state authority over retail sales.

1. The court of appeals concluded that recognizing FERC authority over the "practices" directly affecting wholesale rates here would be inconsistent with the proviso because it would prohibit state laws from applying to "first sales and retail sales." Pet. App. 28a. That is incorrect.

a. As an initial matter, first sales do not implicate any additional state regulatory authority. When Congress removed first sales from FERC's jurisdiction over wholesale sales, it left that field free from price regulation by the States as well as by FERC. See *Transco II*, 474 U.S. at 422-423.

b. States do have authority to regulate actual retail sales of natural gas. But "the proviso of § 1(b) withh[o]ld[s] from [FERC] only *rate-setting* authority with respect to direct sales." *Louisiana Power & Light Co.*, 406 U.S. at 638. Here, however, respondents' claims are based on allegations that petitioners manipulated price indices by "reporting false information" to index publishers and "engaging in wash sales" that are reported to index publishers. Pet. App. 9a-10a.

With respect to false reports, the court of appeals observed that "some index pricing inputs [have been] misreported or [were] wholly fictitious." Pet. App. 27a (citation omitted). But a seller's misreporting of a sale price is a *post*-sale action that does not affect the actual rate for (or any other aspect of) the reported sale itself. A wholly fictitious price report is even further removed. Not only does such manipulative action purport to be a post-sale report, it does not even report the price of an actual sale.

With respect to wash sales, the Ninth Circuit indicated that "at least some of the transactions included in the indices" are retail sales over which FERC lacks rate-setting authority, Pet. App. 27a (citation omitted), apparently suggesting that such "wash sales" must be subject to state authority over retail sales. But a "wash sale" is not so much a sale as a *practice* in which parties collude to make offsetting trades. And in any event, a wash-sale transaction inherently rests on a *wholesale* sale of natural gas—*i.e.*, a "sale * * * for resale," 15 U.S.C. 717(b)—because the seller effectively sells natural gas for its immediate *resale* back to it. Such a sale for resale forming the core of a wash-sale transaction falls squarely within FERC's exclusive jurisdiction over wholesale sales.

As a result, respondents' state-law antitrust claims based on petitioners' reporting to price indices are not based on authority that Section 1(b) by its terms has reserved to the States over retail sales themselves. To be sure, false index reporting and wash sales that manipulate price indices can affect the price for *subsequent* retail sales, just as they directly affect wholesale sales that lie within FERC's exclusive jurisdiction. But Congress has made clear that its grant of

jurisdiction to FERC includes authority over practices directly "affecting" wholesale rates, 15 U.S.C. 717d(a), and the NGA contains no similar express reservation for the States. Thus, because FERC-regulated wholesale and state-regulated retail markets are affected by the *same* price indices, FERC's jurisdiction under the NGA, which occupies "the field of matters relating to wholesale sales," *Schneidewind*, 485 U.S. at 305, preempts state regulation of petitioners' manipulative practices alleged by respondents.[6]

2. For the foregoing reasons, the Ninth Circuit erred in concluding that FERC lacks authority to regulate the practices of FERC-jurisdictional sellers that directly affect FERC-jurisdictional rates simply because those practices also have some relation to retail sales. The court of appeals concluded that this

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[6] The NGA would not preempt a State's authority to regulate retail gas sales that the State decouples from the wholesale price indices at issue here. A State could, for instance, directly regulate the actual rates for such sales. FERC "lacks authority to fix rates for [such] direct * * * sales," *Conway Corp.*, 426 U.S. at 281 (quoting *Panhandle E. Pipe Line Co.*, 324 U.S. at 646), even if they affect FERC-regulated wholesale prices, because such state price regulation of retail sales falls squarely within Section 1(b)'s proviso. Likewise, a State might require that if a retail transaction employs a price index, the transaction must use an index based exclusively on retail sales (and not FERC-regulated wholesales) subject to the State's regulatory purview. A State could thereby separate retail from wholesale prices in a manner that would protect its authority from field preemption. But where a State allows retail sellers to set rates based on an index that includes FERC-regulated wholesale rates and is used to determine the price for FERC-regulated transactions, the State cannot trespass upon FERC's exclusive regulation of manipulative practices by jurisdictional sellers that directly affects FERC-jurisdictional sales.

Court's decision in *Northwest Central* supported its narrow interpretation of FERC's authority and that, unless that authority were read narrowly, "no 'conceptual core'" would provide a limitation preventing FERC's authority from swallowing state authority reserved by Section 1(b). Pet. App. 29a-30a, 32a. Both conclusions are incorrect.

In *Northwest Central*, this Court considered a state regulatory order that governed the timing and production of natural gas from the Kansas-Hugoton field by directing that a producer's right to pump its assigned gas-production quota would be cancelled if production was delayed too long. 489 U.S. at 497, 499, 503. Several interstate pipelines held long-term contracts with Hugoton producers entitling them to much of the field's potential production, but the pipelines had reduced their Hugoton purchases (effectively storing their gas in the field) because they had entered into other contracts that required that they take production from other locations (or pay for it). *Id.* at 501-505. The plaintiff pipeline argued that the NGA preempted the State's order because it exerted coercive pressure on pipelines to increase their purchases from that field, but the Court rejected that claim. *Id.* at 496-497.

The Court noted that Section 1(b) of the NGA explicitly states that the Act does not apply to the "production or gathering of natural gas," 15 U.S.C. 717(b), and it concluded that the State's order fell within that category as a regulation of the timing of production of natural gas within the State. *Northwest Central*, 489 U.S. at 511-512. The Court acknowledged that the state law "may result in pipelines making purchasing decisions that have an effect on their cost structures

and hence on interstate rates," but it concluded that the possibility that enforcement of the state law "*might* have *some* effect on interstate rates" was insufficient to warrant field preemption. *Id.* at 512-513 (emphases added). The Court thus distinguished the field-preemption holdings in *Northern Natural Gas* and *Transco II*, because *Northern Natural Gas* involved a state provision "directed at [pipeline] purchasers" and *Transco II* likewise involved "state ratable-take orders directed to pipelines" that "forc[ed] upon them certain purchasing patterns." *Id.* at 513-514 (citations and emphasis omitted).

Unlike *Northwest Central*, petitioners' state-law claims are based on practices of FERC-jurisdictional sellers that *directly affected* the price of wholesale gas within FERC's exclusive jurisdiction. The false price reports to and the manipulation of the indices alleged here are "not insignificant or tangential to jurisdictional rates." Pet. App. 111a. The indices both "embody jurisdictional rates" and were "*the* method by which jurisdictional rates are set." *Id.* at 111a-112a (emphasis added); see p. 4, *supra*. That close connection between petitioners' challenged practices and the rates for FERC-jurisdictional sales brings this case within the heartland of FERC's authority to regulate "practice[s] * * * affecting" such rates, 15 U.S.C. 717d(a).

The court of appeals was also incorrect in believing that recognizing FERC's authority in this case would swallow state rate-setting authority over retail gas sales. This case concerns only the practices of FERC-jurisdictional sellers that *directly* affect FERC-jurisdictional rates. Although FERC's jurisdiction extends to (a) false reporting to price-index publishers

by jurisdictional sellers about non-jurisdictional as well as jurisdictional trades and (b) wash-trading practices by jurisdictional sellers even if the offsetting trades purport to reflect separate retail trades, the existence of FERC jurisdiction reflects the unusual circumstance at the center of this suit: Both wholesale and retail natural-gas prices were based on the *same* price indices that were themselves based on reported wholesale and retail prices. The index-based wholesale and retail natural-gas markets have in that sense and to that extent partially merged. States may exercise their authority to separate their local markets from the wholesale market, see p. 28 n.6, *supra*, but if States permit retail natural-gas prices to be based on the same indices as wholesale sales, FERC's exclusive jurisdiction to regulate wholesale rates necessarily extends to the index-focused practices of jurisdictional sellers that directly affect those rates.

If FERC had lacked jurisdiction to regulate the sort of manipulative practices in this case before 2005, a significant portion of the practices by FERC-jurisdictional sellers that directly affected wholesale rates would have been left to a patchwork of state authority. Such state-by-state regulation would undermine FERC's ability "to regulate comprehensively and effectively the * * * [wholesale] sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." *Northern Natural Gas*, 372 U.S. at 91-92; see *Louisiana Power & Light Co.*, 406 U.S. at 631 (In drawing the line between FERC and state authority in an area of potential overlap, "'we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide

that federal authority governs.'") (quoting *Transco I*, 365 U.S. at 19-20); see also *Schneidewind*, 485 U.S. at 310.[7]

C. FERC's Interpretation Of Its Statutory Authority Underlying Its 2003 Code Of Conduct Is Entitled To Deference

Even if the NGA were ambiguous about the scope of FERC's authority, this Court should defer to FERC's reasonable conclusion that it possesses that authority under the NGA. If a "'statute is silent or ambiguous'" regarding the proper scope of authority that Congress conferred on an agency, the agency's "reasonable interpretation" of "the scope of [its] statutory authority (that is, its jurisdiction)" is entitled to *Chevron* deference. *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868, 1874-1875 (2013) (citation omitted); see *Mississippi Power & Light Co.*, 487 U.S. at 380-381 (Scalia, J., concurring in the judgment) (FERC's construction of Federal Power Act, including provisions "designed to confine its authority," is entitled to *Chevron* deference.).

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[7] FERC did not exercise regulatory authority over non-jurisdictional sellers' index-related practices associated with non-jurisdictional sales before Congress's 2005 enactment of EPAct. In EPAct, Congress directed FERC to regulate the manipulative practices of "any entity" employed in connection with jurisdictional sales. 15 U.S.C. 717c-1. Under FERC's construction of that provision, Congress granted FERC authority to regulate *non*-jurisdictional entities' manipulative reporting about, and wash-trade practices purporting to involve, non-jurisdictional sales when they are used to manipulate wholesale gas rates, pp. 7-8, *supra*, thereby providing a single federal standard for such practices for all natural-gas sellers. This case, however, does not call for the Court to interpret the scope of FERC's authority under EPAct.

a. FERC has reasonably concluded that it possessed statutory authority before 2005 to regulate the type of manipulative conduct of jurisdictional sellers at issue in this case. In 2003, FERC amended its blanket gas-marketing certificates to impose a Code of Conduct on jurisdictional sellers. See pp. 5-7, *supra*. That Code expressly prohibited jurisdictional sellers from engaging in actions without a legitimate business purpose to manipulate market prices, including wash trades, and from making false price reports to index publishers. *Amendments to Blanket Sales Certificates*, 68 Fed. Reg. 66,323, 66,337 (Nov. 17, 2003) (promulgating 18 C.F.R. 284.403 (2004)). FERC specifically invoked "Sections 5, 7, and 16 of the NGA" as statutory authority to adopt that Code. *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. at 61,690.

As discussed above, Section 5(a) of the NGA authorized FERC to regulate "any * * * practice * * * affecting" rates subject to its jurisdiction and to prohibit such practices that are "unjust" or "unreasonable." 15 U.S.C. 717d(a). Section 7 further authorized FERC to attach to certificates for jurisdictional sellers "reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. 717f(e). And Section 16 authorized FERC to make orders, rules, and regulations and to take actions "as it may find necessary and appropriate to carry out [the NGA]." 15 U.S.C. 717*o*; see *Louisiana Power & Light Co.*, 406 U.S. at 642 (Section 16 "assures the [Commission] the necessary degree of flexibility" to carry out its "'broad responsibilities'" and "'therefore demand[s] a generous construction'") (citation omitted). FERC invoked those provisions in promulgating its 2003 Code of Conduct based on its findings that the

Code's "prohibited practices are unjust and unreasonable"; that "explicit" anti-manipulation prohibitions were "necessary to ensure that market-based sales of gas * * * will be just and reasonable"; and that "the public convenience and necessity" further warranted adopting the Code "to ensure a competitive and transparent market." *Amendments to Blanket Sales Certificates*, 107 F.E.R.C. at 61,690. Although FERC did not analyze its authority further, its conclusion that the NGA conferred authority to address the prohibited practices is reasonable, see pp. 17-32, *supra*, and entitled to deference. See *City of Arlington*, 133 S. Ct. at 1868, 1874-1875.

b. The Ninth Circuit concluded that FERC's 2003 Code of Conduct did not suggest that "FERC had jurisdiction over the market manipulation at issue" here. Pet. App. 36a-37a. The court's reasons for its conclusion do not withstand scrutiny.

First, the Ninth Circuit concluded that the Code of Conduct applied only to practices arising from "sales within [FERC's] jurisdiction" because FERC noted that it "'does not regulate the entire natural gas market'" and applied the Code to "'that portion of the gas market which is within its jurisdiction.'" Pet. App. 38a (quoting 68 Fed. Reg. at 66,326). But FERC's rationale was that it could not regulate "all *sellers* of natural gas," 68 Fed. Reg. at 66,326 (emphasis added), not that it lacked authority to prohibit *jurisdictional* sellers from engaging in the type of conduct alleged here. The terms of the 2003 Code of Conduct thus broadly prohibited jurisdictional sellers from taking actions to manipulate "market prices" (including wash trades) and from providing false information to index publishers, without limiting those prohibitions

to contexts involving jurisdictional sales. 18 C.F.R. 284.403(a) and (b) (2004).

Second, the Ninth Circuit concluded that Congress's 2005 passage of EPAct's market-manipulation provision (15 U.S.C. 717c-1) would be "superfluous" if FERC had preexisting authority to regulate the conduct here. Pet. App. 37a-38a. That is incorrect. Section 717c-1 *expanded* the prohibitions in FERC's 2003 Code of Conduct by making it unlawful for "any entity"—not just jurisdictional entities—directly or indirectly to use a manipulative or deceptive device (as those terms are used in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b)) in connection with a jurisdictional sale in violation of FERC's implementing regulations. See 15 U.S.C. 717c-1; pp. 7-8, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DAVID L. MORENOFF
General Counsel
ROBERT H. SOLOMON
Solicitor
HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General

SEPTEMBER 2014

APPENDIX

1. Section 1 of the Natural Gas Act, 15 U.S.C. 717, provides in pertinent part:

Regulation of natural gas companies

* * * * *

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

2. Section 2 of the Natural Gas Act, 15 U.S.C. 717a, provides in pertinent part:

Definitions

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

* * * * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

* * * * *

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

* * * * *

3. Section 4 of the Natural Gas Act, 15 U.S.C. 717c, provides in pertinent part:

Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * * * *

4. Section 4A of the Natural Gas Act, 15 U.S.C. 717c-1 (added 2005), provides:

Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

5. Section 5 of the Natural Gas Act, 15 U.S.C. 717d, provides:

Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do

so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

6. Section 7 of the Natural Gas Act, 15 U.S.C. 717f, provides in pertinent part:

Construction, extension, or abandonment of facilities

* * * * *

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be

served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

* * * * *

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

7. Section 16 of the Natural Gas Act, 15 U.S.C. 717*o*, provides:

Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

AMICUS CURIAE BRIEF

No. 13-271

In The
Supreme Court of the United States

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

RICHARD M. BRUNELL
Counsel of Record
ALBERT A. FOER
SANDEEP VAHEESAN
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
(202) 600-9640
rbrunell@antitrustinstitute.org

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

The AAI submits this brief in support of affirming the decision of the Ninth Circuit holding that respondents' state antitrust claims are not preempted by the Natural Gas Act (NGA). The question raised in this case is important to AAI's mission because state antitrust law is a critical component of the U.S. antitrust regime, which complements sectoral regulation by the Federal Energy Regulatory Commission

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. The AAI's Board of Directors alone has approved of this filing for the AAI. Individual views of board members or members of the Advisory Board may differ from the AAI's positions. Prof. Peter Carstensen, a senior fellow and member of the Advisory Board, served as an expert for certain Wisconsin respondents. He played no role in the preparation of this brief.

(FERC). "Since the 19th Century, the United States has relied on a combination of federal, state, and private enforcers to combat anticompetitive conduct." Bill Baer, Ass't Atty. General, Antitrust Division, U.S. Dep't of Justice, Public and Private Antitrust Enforcement in the United States, Remarks as Prepared for Delivery to European Competition Forum 2014 at 1 (Feb. 11, 2014). Indeed, state antitrust law predates the Sherman Act, which was intended "to supplement, not displace, state antitrust remedies." *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989).

"Given the long history of state common-law and statutory remedies against monopolies and unfair business practices," this Court has held that state antitrust laws are entitled to "the presumption against finding pre-emption." *Id.* at 101. This presumption is all the more important in regulated industries in the modern era because, as those industries are deregulated, "the natural result . . . is an increased role for the antitrust laws." Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 341. Preempting state antitrust law in these circumstances, therefore, would deprive natural gas and electricity markets of a necessary and valuable tool to deter and remedy anticompetitive conduct, and invite similarly misguided efforts to preempt state antitrust law in other markets with sector-specific regulatory schemes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' preemption theory is far-reaching: applying state antitrust laws to price fixing and other hard-core antitrust violations in deregulated natural gas markets would be preempted as long as FERC *could* address aspects of the conduct that form the basis of the antitrust claims. Petitioners would oust state antitrust law regardless of whether it conflicts with FERC regulation or whether FERC was or could be "an effective steward of the antitrust function." *Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 413 (2004).

Petitioners' theory does not depend on whether there is any potential that FERC would endorse cartel conduct that the antitrust laws forbid – there is none. Neither does it depend on whether FERC's power to address the index-reporting conduct at issue involves the application of antitrust standards – it does not. Petitioner's theory also does not rest on whether FERC could penalize the conduct retrospectively – it could not. Finally, petitioners' theory does not turn on whether FERC could provide any compensation to purchasers of natural gas victimized by petitioners' conduct, let alone direct retail customers like the respondents here whose purchases were not subject to FERC jurisdiction – it could not.

Petitioners' preemption theory would bar not only private state antitrust suits in natural gas markets, but enforcement by state attorneys general. And it

would apply not only to natural gas markets, but also to deregulated electricity markets subject to FERC's jurisdiction. Beyond antitrust law, petitioners' theory would suggest that other generally applicable state laws – including criminal or tort prohibitions on fraud, extortion, and theft – would also be preempted when applied to conduct that FERC *could* address.

Implied preemption under the Natural Gas Act does not sweep so far. Only an interpretation of FERC's "exclusive jurisdiction" unhinged from any context or congressional purpose could produce the extreme result advocated by petitioners. Even assuming that FERC had jurisdiction to address the index manipulation at issue in this case, and apart from the NGA's express reservation of authority to the States under § 1(b) of the Act to regulate retail transactions, petitioners' expansive preemption theory should be rejected for several reasons.

First, petitioners treat this case as if it involves a conflict between federal and state utility regulation. It does not. The antitrust laws do not constitute regulation directed at the natural gas market. The antitrust laws are laws of general applicability that ordinarily apply to all economic actors. They define the rules of the free-market economy, as an alternative to traditional sector-specific regulation. Under this Court's preemption jurisprudence, state laws of general applicability usually are not preempted. The Court recognized this principle in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). Petitioners' "leading case" made it clear that, unlike a state

securities law directed at natural gas companies and intended to regulate rates within FERC's control, a generally applicable blue sky law would not be preempted when it is applied to natural gas companies.

All of petitioners' other cases involve preemption of state utility regulations, not laws of general applicability. A state law of general applicability does not become a law "directed at" a field over which FERC has jurisdiction whenever it is applied to conduct in the field. Such a reading would imply the preemption of not only state blue sky laws but also any contract or tort claim in FERC regulated markets. Moreover, whether the index-reporting practices at issue may "directly affect" wholesale rates says nothing about whether a state law that affects reporting practices is "directed at" either such practices or wholesale rates. Petitioners' preemption theory leads to the anomalous result that if they raised index prices by blackmailing or bribing index publishers or by stealing and hacking their software, state criminal or civil claims for fraud, extortion, or theft would be preempted.

Second, there is no risk of an imminent collision between FERC regulation and state antitrust enforcement. The "regulatory chaos" predicted by petitioners ignores that state antitrust laws generally follow federal antitrust law on substantive issues, and there is no divergence as to hard-core antitrust offenses like the price fixing alleged here. The fact that some state antitrust laws provide remedies that

are not available under federal antitrust law creates no conflict with the objectives of the NGA.

Petitioners and the Solicitor General concede that respondents' antitrust claims would not be barred had respondents brought their claims under federal antitrust law. The only appellate court to address the issue has held that when state antitrust law mirrors federal antitrust law, it is not preempted by the NGA. *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991). This makes perfect sense. The fact that federal antitrust law is not precluded by the NGA militates against preemption because there is no basis to believe that when it enacted the National Gas Act in 1938, Congress intended to allow the continued application of federal antitrust law but not analogous state antitrust law. Also, the presumption against finding preemption of state antitrust laws is similar to the rule of construction that implied immunity from federal antitrust law is disfavored. The presumption against preemption of antitrust laws does not disappear merely because petitioners assert a field-preemption theory or because this Court has determined that under the NGA field preemption applies to some state utility laws. The question to which the presumption applies is whether state antitrust laws in general, or respondents' price-fixing claims in particular, are within the field Congress intended to preempt.

State and federal antitrust enforcement complements FERC oversight, and plays an increasingly

important role as Congress and FERC have deregulated natural gas markets. In contrast to the previous price-regulated environment, natural gas companies now have wide discretion over pricing and other contractual terms. FERC oversight helps promote competitive natural gas markets, but it has important limitations. For example, its ability to police collusion through its market manipulation authority is limited to conduct that involves fraud and deceit. Antitrust is concerned with collusion itself. When FERC brings an enforcement action, it can only award restitution, not damages, and only to wholesale customers to remedy a violation of a specific rule or tariff. Thus, respondents could not have obtained relief from FERC.

In sum, antitrust enforcement complements FERC's supervision of natural gas markets by addressing anticompetitive harm that FERC does not, and by providing remedies to victims that FERC cannot. Federal and state antitrust enforcement are both important. The Justice Department and the States bring cases in markets regulated by FERC. And private enforcement is an essential element of both the Sherman Act and state antitrust law.

ARGUMENT

I. STATE ANTITRUST LAWS, AS LAWS OF GENERAL APPLICABILITY, ARE NOT WITHIN THE FIELD PREEMPTED BY THE NATURAL GAS ACT

Even if FERC had the authority to regulate the challenged misconduct here as a "practice . . . affecting [wholesale] rate[s]," 15 U.S.C. § 717d(a), respondents' state antitrust claims are not preempted because the state antitrust laws do not "attempt to regulate matters within FERC's exclusive jurisdiction." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988). Rather, state antitrust laws are laws of general applicability governing the "free market," which are not "directed at[] the control of rates and facilities of natural gas companies." *Id.*

A. The Antitrust Laws Are Rules of the Free Market, Not Regulation Directed at the Natural Gas Market

Petitioners' arguments in favor of implied field preemption rest on the assumption that antitrust laws constitute regulation directed at the natural gas market. *See* Pet. Br. 12, 16, 26. However, the antitrust laws are laws of general applicability that ordinarily apply to all economic actors. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Like contract and property law, the antitrust laws "define the rules of the free market economy." *Paper Systems Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364, 368 (E.D.

Wis. 1997). They "are the Magna Carta of free enterprise." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *accord Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004); *see also Community Communs. Co. v. City of Boulder*, 455 U.S. 40, 56 (1982) (antitrust laws embody our "commitment to the policy of free markets and open competition"). And the First Commandment of the antitrust laws, "Thou shalt not conspire to fix prices," – which is at issue in this case – is as fundamental as the laws against theft. *See Trinko*, 540 U.S. at 408 ("the supreme evil of antitrust [is] collusion"); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 Fordham L. Rev. 2349, 2355 (2013) ("[T]he overriding goal of the antitrust statutes was to protect consumers from theft.").

State antitrust law, which is often enshrined in state constitutions, is also a linchpin of the free market. *See, e.g., Am. Med. Transp. of Wisconsin, Inc. v. Curtis-Universal, Inc.*, 452 N.W.2d 575, 582 (Wis. 1990) (adopting *Topco*'s Magna Carta characterization and noting that Wisconsin antitrust statute is intended "'to make competition the fundamental economic policy of this state'" (quoting Wis. Stat. § 133.01)).

Accordingly, antitrust laws provide a fundamentally different method for policing markets than state or federal laws regulating the natural gas industry. *See Blue Cross & Blue Shield United of Wisconsin v.*

Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995) (Posner, C.J.) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute"). As then-Judge Breyer explained, "antitrust is more accurately contrasted with, rather than viewed as another form of, government regulation." Stephen Breyer, *Regulation and its Reform* 157 (1982).

> The antitrust laws seek to create or maintain the *conditions* of a competitive marketplace rather than replicate the *results* of competition or correct for the defects of competitive markets. In doing so, they act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not order firms to behave in specified ways; for the most part, they tell private firms what not to do.

Id. at 156-57; *see Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) (regulation and antitrust "seek to achieve [similar] goals in very different ways"); *Trinko*, 540 U.S. at 408 (antitrust courts are "ill suited" "to act as central planners, identifying the proper price, quantity, and other terms of dealing"). In its preemption jurisprudence, this Court has recognized the "well established distinction between [regulatory] supervision and law enforcement." *Cuomo v. The Clearing House Ass'n*, 557 U.S. 519, 528 (2009). Antitrust is a matter of law enforcement.

B. State Laws of General Applicability Ordinarily Are Not Preempted

Courts "ordinarily do not deem Congress to preempt laws of general applicability." *E&J Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1046 (9th Cir. 2007). For example, notwithstanding the "expansive sweep" of the preemption clause of the Employee Retirement Income Security Act of 1974, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), this Court has held that ERISA does not preempt "myriad state laws of general applicability that impose some burdens on the administration of ERISA plans." *De Buono v. NYSA-ILA Med. and Clinical Services Fund*, 520 U.S. 806, 815 (1997) (internal quotation marks omitted); *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) (general health care regulation not preempted by ERISA). And although the National Bank Act "shields national banking from unduly burdensome and duplicative state regulation, . . . [f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

Likewise, this Court has held that the Occupational Safety and Health Act does not generally preempt "state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike." *Gade v.*

Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 107 (1992); *see also Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970, 974-75 n.10 (2012) (while preemption clause of Federal Meat Inspection Act "sweeps widely" as to slaughterhouse requirements, "state laws of general application (workplace safety regulations, building codes, etc.) will usually apply to slaughterhouses").

This Court applied the same principles in analyzing preemption under the National Labor Relations Act. The Court held that a state unemployment compensation law allowing strikers to receive benefits was not preempted by the NLRA where the plurality characterized the state statute as one of general applicability and noted that "our cases have consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted [labor] activity." *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 533 (1979) (plurality opinion). *Metropolitan Life Insurance Co. v. Massachusetts* held that minimum labor standards affecting union and nonunion employees equally – which were "state laws of general application affecting terms of collective-bargaining agreements subject to mandatory bargaining" – were not pre-empted by the NLRA. 471 U.S. 724, 753-56 (1985).[2]

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[2] Even cases involving the very broad *express* preemption provisions of the airline and motor carrier deregulation laws,

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In *Schneidewind*, this Court recognized that state laws of general applicability ordinarily are not preempted by the Natural Gas Act. The Court held that the NGA preempted a Michigan law that specifically regulated the issuance of securities by natural gas companies because the state law was "directed at[] the control of rates and facilities of natural gas companies." 485 U.S. at 308. However, the Court made clear that preemption would not extend to state "blue sky" laws, which *generally* govern the "registration and sale of securities sold within the State." *Id.* at 308 n.11.[3] Citing *Metropolitan Life*'s discussion of

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cited by petitioners (Br. 37 n.6), recognize that generally applicable state laws often are not preempted when applied to the otherwise preempted federal field. Thus, in *Rowe v. New Hampshire Motor Transport Ass'n*, this Court held that Maine laws governing the delivery and transportation of tobacco that "aim directly at the carriage of goods" were preempted by federal trucking law, but that "state regulation that broadly prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public" would not be preempted. 552 U.S. 364, 375-76 (2008); *see id.* at 375-77 ("public health regulation" not generally preempted; state could address tobacco health issues by passing "other laws of general (non-carrier-specific) applicability").

[3] The Court noted that state blue sky laws governed "'securities regulation' in the traditional sense of the term," which is "one area FERC does not exclusively control." *Schneidewind*, 485 U.S. at 308 n.11. Fraud in issuing securities to finance a natural gas project could be the basis for FERC denying a certificate of convenience for the facility, *see id.* at 302, as well as for liability under the Michigan blue sky law. Antitrust enforcement is another area that FERC does not exclusively control.

state laws of general application, the Court indicated that the preempted Michigan statute was not such a generally applicable state law with only "'indirect'" effects, because the "*central purpose* [of the statute] is to regulate matters that Congress intended FERC to regulate." *Id.* at 308-09 (emphasis added); *see also Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 516 (1989) (citing *Schneidewind* for the proposition that a state regulation may be preempted if its "impact on matters within federal control is not an incident of efforts to achieve a proper state purpose").[4]

C. Petitioners Rely on Cases That Involve State Regulations Directed at Natural Gas or Electricity Markets, Not State Laws of General Applicability

To support their preemption claim, petitioners cite four cases that involved state utility regulation *directed at* natural gas or electricity markets, rather than state laws of general applicability. Petitioners'

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[4] Petitioners read *Schneidwind*'s reference to statutes with only "indirect effects" as supporting their contention that conduct that directly affects wholesale rates cannot be subject to state law. Pet. Br. 35. But the distinction the Court drew was not whether the conduct at issue (issuing securities) had a direct or indirect effect on rates or facilities, but whether the *statute* at issue was "directed at[] the control of rates and facilities of natural gas companies" because of its specificity and purpose. The effect of a state law not so directed was deemed "'indirect.'" *Schneidewind*, 485 U.S. at 308.

"leading case is *Schneidewind*," Pet. Br. 23, which, as explained above, involved a utility-specific securities law whose purpose was "to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.'" *Id.* at 24 (quoting *Schneidewind*, 485 U.S. at 308) (quotation marks omitted); *see also Nw. Cent. Pipeline*, 489 U.S. at 513 n.10 ("[N]ot only was the regulation at issue in [*Schneidewind*] directed to interstate gas companies, but it also had as its central purposes the maintenance of their rates at what the State considered a reasonable level, and their provision of reliable service.").

Petitioners also rely on *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963), in which this Court held that a "ratable take" order of the Kansas utility commission was preempted. The Court distinguished "between conservation measures aimed directly at interstate purchasers and wholesales for resale," such as the order at issue, which are preempted "when they threaten . . . the achievement of the comprehensive scheme of federal regulation," and conservation measures "aimed at producers and production," which are not. *Id.* at 94; *see also Transcon. Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409 (1986) (same).

And petitioners rely on *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), which held that the Federal Power Act required the Mississippi Public Service Commission to allow a utility "to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined

wholesale rate for a FERC-mandated allocation of power." *Id.* at 373. The Court applied the principle that, "'[o]nce FERC sets . . . a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable.'" *Id.* (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986)). And petitioners rely on *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which was not a preemption case, as such. Rather, it held that the Federal Power Commission had authority to issue curtailment orders that include non-jurisdictional direct sales, under its authority to regulate the interstate transportation of natural gas.

These cases, in which this Court has found state utility regulation to be preempted by federal law, all have involved just that, state *utility* regulation, which, petitioners recognize, was "'directed at . . . things over which FERC has comprehensive authority.'" Pet. Br. 3 (quoting *Schneidewind*, 485 U.S. at 308) (ellipsis in original). Obviously, state antitrust laws, as laws of general application, are *not* "directed at" the natural gas market, utilities, or index reporting practices. Rather, as explained above, they enforce well-established norms of conduct for *all* firms, including the prohibition of price fixing by competitors. *See also infra* II.A.

Yet petitioners insist that preemption here follows from these cases because petitioners' *claims or lawsuits* "target," or are directed at, index manipulation by wholesale sellers within FERC's jurisdiction. Pet.

Br. 3, 12; *see also* U.S. Br. 23. But accepting this argument would eviscerate *Schneidewind*'s distinction between "a state law whose central purpose is to regulate matters that Congress intended FERC to regulate," and laws of general application like state blue sky laws. *Schneidewind*, 485 U.S. at 308-09; *cf. Pilot Life*, 481 U.S. at 50 ("[I]n order to *regulate* [an industry], a law must not just have an impact on the . . . industry, but must be specifically directed toward that industry.") (emphasis added). If preemption analysis turned on whether a *particular* claim or lawsuit was directed at a field over which FERC has jurisdiction, then state blue sky laws as applied to natural gas companies would be preempted, as would any contract or tort claim in FERC-regulated markets, which is obviously not the case. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 n.12 (1981) (state law contract claims consistent with federal tariff are actionable); *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 896 (7th Cir. 2013) (same).[5]

To be sure, state common law duties have occasionally been preempted under some statutes, as

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[5] Petitioners' theory would suggest that if a natural gas company breached its contract to supply gas to wholesale purchasers, the purchasers' suit to recover damages would amount to impermissible "regulation" of the wholesale market because the "'obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" Pet. Br. 26-27 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

petitioners point out. Pet. Br. 27. Typically, however, *general* common law or statutory duties are not preempted. *See, e.g., Altria Group, Inc. v. Good*, 555 U.S. 70, 84 (2008) (general duty not to deceive in state unfair practice statute, like common law duty not to make fraudulent statements, is not preempted by Federal Cigarette Labeling and Advertising Act; finding "no support for an argument that a general prohibition of deceptive practices is 'based on' the harm caused by the specific kind of deception to which the prohibition is applied in a given case"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69-70 (2002) (Federal Boat Safety Act of 1971 "might be interpreted as expressly occupying the field with respect to state positive laws and regulations," but the "occupied 'field' [does not] include judge-made common law"); *English v. General Elec. Co.*, 496 U.S. 72 (1990) (common law claim for intentional infliction of emotional distress based on retaliation against employee's nuclear-safety complaints not within the preempted field of nuclear safety).

Petitioners' assumption that the index reporting practices at issue "directly affect" wholesale rates does not bolster their position. Pet. Br. 40-43. The question is whether state antitrust law as applied to reporting practices is "directed at" the preempted field. Indeed, petitioners' preemption theory leads to the anomalous result that if they raised index prices by blackmailing or bribing the index publishers, or by stealing and hacking the publications' software, state law criminal or tort claims for fraud, extortion, or

theft would be preempted because the prohibited conduct likewise would "directly affect" wholesale rates.

Petitioners' attempt to portray this case as involving a conflict between federal and state utility regulation cannot be sustained. Regardless of FERC's authority, petitioners' implied field preemption theory must be rejected because applying state antitrust laws to petitioners' conduct does not "intrude[] on a field of regulation that federal legislation has occupied," *Schneidewind*, 485 U.S. at 309 n.12.

II. THERE IS NO IMMINENT POSSIBILITY OF COLLISION BETWEEN STATE ANTITRUST ENFORCEMENT AND FEDERAL ENERGY REGULATION

Petitioners' claim of an imminent collision between state antitrust enforcement and federal regulation of the natural gas market ignores that, in general, state antitrust laws are in substantive harmony with federal antitrust law. And in particular, all would condemn the price fixing among competitors alleged here. And the fact that federal antitrust claims are not precluded militates against preemption of analogous state antitrust law. Both federal and state antitrust enforcement complement FERC oversight of natural gas markets, particularly under

deregulation, and especially when it concerns such unambiguously anticompetitive conduct.[6]

A. State Antitrust Laws Are in Harmony and Consistent with Federal Law on Substantive Standards, Particularly as to Price Fixing

Petitioners contend that the enforcement of state antitrust law would result in "regulatory chaos" and a "morass under which individual states can impose their own conflicting standards." Pet. Br. 16, 17, 33. According to petitioners, "there is no Platonic ideal of a competitive market that all antitrust laws strive to protect; on the contrary, 'there is much disagreement as to the meaning of a "competitive" market, and therefore, when antitrust law should intervene.'" *Id.* at 31 (quoting *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010)). In fact, however, state antitrust laws generally follow federal antitrust law on substantive issues. *See generally* ABA Section of Antitrust Law, *State Antitrust Enforcement Handbook* 22-23 (2d ed. 2008). As Professors Areeda and Hovenkamp explain,

> The antitrust laws of many states follow a common pattern of construction. First, they

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[6] Petitioners do not argue here, and did not argue below, that there is an *actual* conflict between state antitrust enforcement and federal regulation; they simply contend that there is a *potential* conflict which supports their field-preemption argument.

> use statutory language that tracks the federal statutes closely. Then by either statute or state supreme court declaration, they hold that on substantive issues federal case law should be regarded as precedential.
>
> . . .
>
> [E]ven in those states whose statutes or general case law permit deviation, variance from federal law in substantive doctrine is quite exceptional.

14 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2410, at 350-51, 355 (3d ed. 2012).

For example, on questions of substantive law, the state antitrust laws of Colorado, Kansas, Missouri, Oklahoma, Wisconsin, and Wyoming – under which respondents have brought their claims – are all applied in a manner consistent with federal antitrust precedent. Colorado law provides that "in construing [state antitrust laws], the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws." Colo. Rev. Stat. § 6-4-119. Although the Kansas courts historically treated federal antitrust law as only persuasive authority, state statute now requires the courts to generally follow federal precedent. Kan. Stat. Ann. § 50-163(b). Similarly, Missouri law requires that the state's antitrust laws "be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." Mo. Rev. Stat. § 416.141. Oklahoma law also requires that the state antitrust law "be interpreted in a manner consistent with Federal

Antitrust Law." Okla. Stat., tit. 79, § 212. In Wisconsin, state courts "have [long] followed federal court interpretations of Sections 1 and 2 of the Sherman Act and have construed Wisconsin antitrust statutes in conformity with these federal court interpretations." *Meyers v. Bayer AG, Bayer Corp.*, 735 N.W.2d 448, 465 (Wis. 2007) (alteration in original). Wyoming antitrust case law is sparse and does not address the role of federal precedent but Wyoming law is analogous to the Sherman Act. *See* Wyo. Const., art. 10, § 8 (banning trusts); Wyo. Stat. § 40-4-101 (parties are prohibited from entering into agreements to "prevent competition or to control or influence production or prices").

Particularly as to price fixing, there is no divergence among the States. Under the Sherman Act, the conspiracy to inflate retail prices alleged here is per se illegal. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*.").[7] States would likewise condemn the price fixing conspiracy as per se

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[7] The allegations here bear a resemblance to the facts of *Socony-Vacuum*. That case involved a conspiracy by major oil companies to raise the price of their gasoline sales to jobbers (and ultimately consumers), which were pegged by contract to spot market prices published in market journals. The major oil companies sought to raise or maintain the published spot market prices by purchasing distress gasoline from independent refiners at artificially inflated prices.

illegal, either because they follow the Sherman Act or expressly codify the per se rule against price fixing. *See generally* Michael A. Lindsay, *Overview of State RPM*, The Antitrust Source (Oct. 2014) http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_lindsay_chart.authcheckdam.pdf (survey of state antitrust laws); *see also* 14 Areeda & Hovenkamp, ¶ 2418, at 392 ("state law of cartels . . . very largely tracks federal law on the same subject").

Petitioners' argument (Pet. Br. 31) that there is a potential conflict because a state court jury might find a manipulative wash sale or a deceptive practice where FERC might consider the conduct to be a legitimate business transaction is beside the point. There is no risk that FERC would consider a *price fixing conspiracy* to be a legitimate business transaction.

Petitioners also argue that state remedies that are available under some state antitrust laws but not federal antitrust law create a potential conflict with the NGA. In particular, they point to the laws of three states at issue in this case which allow (or did allow) victims of pricing fixing to recover the full amount of the purchase price, regardless of the size of the overcharge.[8] Pet. Br. 32. However, there is no general

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[8] Full-consideration damages have a venerable antitrust pedigree. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 Fordham L. Rev. 2279, 2341-42 (2013) (noting that full-consideration remedies were in the earliest state antitrust laws, predating the Sherman Act). Full

(Continued on following page)

principle that state remedies broader than those available under federal law conflict with careful federal frameworks.

On the contrary, "[o]rdinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as [the whistleblower protections of the Atomic Energy Act], does not by itself imply pre-emption of state remedies." *English*, 496 U.S. at 87; *see also Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (state law providing for revocation of license to do business for employing unauthorized aliens did not interfere with federal regulation of immigration). Indeed, in the antitrust field, this Court has explicitly held that states may impose "liability in addition to that imposed by federal law" without conflicting with federal antitrust law. *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989) (noting that "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law").

And if Sherman Act treble damages and criminal sanctions for price fixing do not conflict with the

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consideration damages may or may not exceed the treble damages available under federal antitrust law. Full consideration will be less than treble damages when the cartel overcharge is more than one-third, which is often the case. *See generally* John M. Connor, *Cartel Overcharges*, *in* 26 Res. in Law & Econ. 249 (2014) (meta-survey of cartel studies and other data finds median overcharge of 23% and mean overcharge of at least 49%).

objectives of the NGA in general, or FERC regulation of index reporting practices in particular, then it is difficult to understand how full-consideration remedies would somehow conflict.

B. The Fact That FERC's "Exclusive Jurisdiction" Does Not Preclude Federal Antitrust Claims Militates Against Preemption of Analogous State Antitrust Law

This Court has held that the Natural Gas Act does *not* displace federal antitrust law. *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962) ("[T]here is no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to the Commission."); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) ("There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws."). Thus, had respondents brought their claims under the Sherman Act, they would not have been precluded, as the lower courts so held. *See* Pet. App. 42a. Petitioners and the Solicitor General recognize that federal antitrust laws would apply. Pet. Br. 32; U.S. Br. 24-25 ("NGA does not insulate companies from federal antitrust laws;" premise of filed-rate doctrine inapplicable when sellers "act beyond the scope of their FERC-issued certificate").

The fact that federal antitrust law is not precluded by the NGA strongly militates against preemption of analogous state antitrust claims, for two reasons. First, both preclusion and preemption are at bottom based on the intent of Congress. *See English*, 496 U.S. at 78-79 ("Pre-emption fundamentally is a question of congressional intent" (citing *Schneidewind*, 485 U.S. at 299)); *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014) (whether one federal statute precludes another is a question of statutory interpretation). There is no basis to believe that when it enacted the Natural Gas Act in 1938, Congress intended to allow the continued application of federal antitrust laws, but not analogous state antitrust laws.

Second, the canons of statutory construction as to preclusion of federal antitrust claims and preemption of state antitrust claims are similar. Just as the doctrine of implied immunity raises a high bar for precluding federal antitrust claims, so too is there a strong presumption against the preemption of state antitrust laws. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws . . . repeals by implication" are "disfavored." *Fed. Trade Comm'n v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010 (2013). Similarly, state antitrust laws are entitled to the presumption that "'the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *ARC America*,

490 U.S. at 101 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).[9]

Accordingly, the Seventh Circuit has held that the Natural Gas Act does not preempt state antitrust claims "[w]hen state antitrust law only mirrors federal antitrust law." *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479 (7th Cir. 1991). *Burris* is consistent with this Court's cases that treat similar state and federal laws similarly for preemption and preclusion purposes. *See, e.g., Metropolitan Life*, 471 U.S. at 755 ("We see no reason to believe that . . . Congress intended state minimum labor standards to be treated differently from minimum federal standards."); *Cuomo*, 557 U.S. at 528 (fact that Comptroller's "exclusive exercise" of visitorial powers did not preclude law enforcement by federal agencies supported conclusion that state law enforcement was not preempted). Indeed, just last term, this Court held that principles of preemption precedent were "instructive" for analyzing preclusion of federal claims "insofar as they are designed to

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[9] "Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." *ARC America*, 490 U.S. at 101. The Court noted: "At the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws. Moreover, the Sherman Act itself, in the words of Senator Sherman, 'does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.'" *Id.* at 101 n.4 (citations omitted).

assess the interaction of laws that bear on the same subject." *Pom Wonderful*, 134 S. Ct. at 2236.

The Solicitor General cites *Connell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 635-37 (1975), for the proposition that federal regulation (there, the NLRA) can preempt state antitrust laws without precluding federal antitrust law. U.S. Br. 24. In *Connell*, however, there was a difference between state and federal antitrust law, which is how the Seventh Circuit in *Burris* distinguished the case. Whereas federal antitrust law had been "carefully tailored" to avoid conflict with federal labor policy, state antitrust laws, "[i]f they take account of labor goals at all, . . . may represent a totally different balance between labor and antitrust policies." *Connell*, 421 U.S. at 636.[10] Thus, unlike federal antitrust law, state antitrust law "create[d] a substantial risk of conflict with policies central to federal labor law." *Id.* In contrast, here federal and state antitrust laws are in harmony and both complement federal natural gas regulation, so there is no threat of conflict.

The Solicitor General also incorrectly asserts that the presumption against preemption does not apply here because the only question is the "proper scope" of FERC's authority. U.S. Br. 16 n.2 (citing *New York v. FERC*, 535 U.S. 1, 17-18 (2002)). However, this case

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[10] The Court pointed out that union activity under Texas labor law was not exempt from the Texas antitrust statute at issue. *Connell*, 421 U.S. at 636 n.18.

not only turns on the scope of FERC's authority to regulate, but whether state antitrust law "intrudes" on that authority. *Schneidewind*, 485 U.S. at 309 n.12; *id.* at 305 ("question remains . . . whether [a]ct . . . regulates *within* [the] exclusively federal domain").[11]

Moreover, as the cases cited by *New York v. FERC* demonstrate, the presumption against preemption of the historic powers of the States applies to conflict *or* field preemption. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) ("Appellee must thus present a showing of implicit preemption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *see also Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Indeed, *Schneidewind* itself relied on the fact that the Michigan "regulation of natural gas company securities issuances" was not "a field of regulation that . . . 'the States had traditionally

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[11] Likewise, petitioners' argument that the presumption "has long been overcome" because the Court has determined that 'Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce,'" (Pet. Br. 44, quoting *Schneidewind*, 485 U.S. at 305), ignores that the very question presented is whether the preempted field includes antitrust conspiracy claims based on harm in retail markets.

occupied.'" *Schneidewind*, 485 U.S. at 310 n.13 (quoting *Rice*, 331 U.S. at 230) (brackets omitted).

Petitioners note that "it is unclear whether the presumption should apply . . . 'where there has been a history of significant federal presence.'" Pet. Br. 43 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). However, it *is* clear that state antitrust law long predates federal regulation of natural gas markets. And this Court held subsequent to *Locke* that the presumption against preemption "accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

C. Antitrust Enforcement Complements Federal Regulation, Especially in Deregulated Markets

Given that antitrust is an *alternative* to traditional regulation, *see supra* I.A., "[a]s deregulation turns more decision making back to the regulated firms, antitrust takes a more important role." Herbert Hovenkamp, *The Antitrust Enterprise* 230 (2005); *see* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 Mich. L. Rev. 683, 728 (2011) ("[T]he availability of antitrust enforcement allows regulation to diminish without leaving a gap in oversight of competitive conduct in the relevant markets."); *see also* Alfred E. Kahn, *I Would Do It Again*, Regulation, Feb. 1988, No. 2, at 22, 28

(arguing that failure to enforce antitrust laws in deregulated industries would discredit deregulation).

This Court has recognized the importance of applying "fundamental national polices embodied in the antitrust laws" to markets regulated by FERC when "voluntary commercial relationships . . . are governed in the first instance by business judgment and not regulatory coercion." *Otter Tail*, 410 U.S. at 374. And, as the Ninth Circuit recognized here, "State and federal antitrust laws complement Congress's intent to move to a less regulated [natural gas] market, because such laws support fair competition." Pet. App. 27a; *see also Gallo*, 503 F.3d at 1046 ("[T]he withdrawal of FERC's authority to determine [first sale] rates gives rise to the . . . inference[ ] that normal market forces, including the tug and pull of private lawsuits, will hold sway.").

Congress has deregulated the natural gas market since the late 1970s, eliminating price caps and narrowing FERC's active jurisdiction. *See* Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.*; Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157. Market forces are now the predominant price-setting mechanism in the natural gas industry. Rather than directly set rates as it once did, FERC issues blanket certificates to market participants giving them the right to sell gas at whatever price the market will bear. *See Regulations Governing Blanket Marketer Sales Certificates*, 57 Fed. Reg. 57,952, 57,957-58 (Dec. 8, 1992). FERC oversees the market through a complaint process

under 15 U.S.C. 717d(a).[13] In contrast to the previous price-regulated environment, "firms have a great deal of business discretion even in the areas that are under the agency's formal jurisdiction." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶243g1, at 387 (4th ed. 2013).

FERC oversight helps promote competitive natural gas markets, but it has important limitations. FERC regulation may take competition issues into account. *See, e.g.*, *Gulf States Utilities Co. v. Fed. Power Comm'n*, 411 U.S. 747, 760 (1973) ("Consideration of antitrust and anticompetitive issues by the Commission . . . serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings."). But it does not always do so. *See Otter Tail*, 410 U.S. at 373 ("Although antitrust considerations may be relevant, they are not determinative.").

Indeed the Code of Conduct adopted by FERC partly in response to the market manipulation at issue in this case was not focused on antitrust concerns.

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[13] FERC can withdraw blanket marketing authority if it finds that it no longer leads to rates that are just and reasonable, but its ex post review of rates determined under blanket marketing certificates is sharply restricted under the *Mobile-Sierra* doctrine. *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008); *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

See Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, 66,330 (Nov. 26, 2003) (Order 644) ("Although our regulatory approach includes elements of anti-trust law, it is not limited to the structure of those laws."). FERC's ability to police collusion under the Code of Conduct and its current market manipulation rules is limited to conduct that involves fraud and deceit.[13] In contrast, "[i]t is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which [the antitrust law] strikes down." *Socony-Vacuum*, 310 U.S. at 224 n.59 (ellipsis in original); *see* William H. Stallings, *Colloquium on Antitrust and Regulation: The Continuing Role For Antitrust Enforcement in the Electricity Sector*, 9 Competition Pol'y Int'l 12, 17-21 (2013) (discussing recent antitrust cases brought by the Justice Department in electricity markets where FERC found no violation of its market manipulation rules).

When FERC does bring an enforcement action, it can only award restitution, not damages,[14] and then only to wholesale customers to remedy violations of a

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[13] *See Prohibition of Energy Market Manipulation*, 71 Fed. Reg. 4244, 4252-54 (Jan. 26, 2006) (Order 670) (adopting rule under Energy Policy Act of 2005 modeled on SEC Rule 10b5); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at ¶ 22 (Feb. 16, 2006) (discussing pre-EPAct, cognate anti-manipulation rule for electric utilities).

[14] *See* Order 644, 68 Fed. Reg. at 66,334 (¶95). The Commission was given authority to impose civil penalties for violations of its natural gas rules under the EPAct of 2005. 15 U.S.C. § 717t-1.

specific rule or tariff.[15] Thus, respondents could not have obtained relief from FERC. Moreover, while FERC ordered certain prospective relief with regard to petitioners' index-reporting practices, it apparently obtained no monetary relief for the manipulation.[16] Accordingly, it can hardly be said that "the NGA has equipped FERC adequately to address the precise concerns [antitrust law] purports to manage." *Schneidewind*, 485 U.S. at 309.

Antitrust enforcement, in short, complements FERC's supervision of the natural gas markets by addressing anticompetitive harm that FERC does not, and by providing remedies to victims that FERC cannot. As in other markets, "[s]tate and federal [antitrust] enforcement can be strong complements in achieving optimal enforcement." Antitrust Modernization Comm'n, *Report & Recommendations* at v (2007). The Justice Department has brought important antitrust cases in markets regulated by FERC. *See, e.g., United States v. KeySpan Corp.*, 763 F. Supp. 2d

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[15] *See* Order 644, 68 Fed. Reg. at 66,334 (¶94). Refunds and reparations are not permitted merely because rates or practices are determined to be unreasonable under sections 4 and 5 of the NGA. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

[16] *See* Pet. App. 107a-109a (reciting settlements with some of the petitioners); *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 114 FERC ¶ 61,166, at ¶ 38 (Feb. 16, 2006) (noting that "there were not clear rules to deal with abusive market conduct" prior to Code of Conduct).

633 (S.D.N.Y. 2011); Stallings, *supra*. States have also long brought antitrust cases in gas and electric markets, as the States' amicus brief points out.

Not only does state antitrust enforcement put another cop on the beat, but state law often gives state attorneys general certain options that are unavailable when they enforce federal antitrust law, including seeking relief on behalf of businesses, as well as individuals, *compare, e.g.*, Kan. Stat. Ann. § 50-103(a)(8) *with* 15 U.S.C. § 15c(a)(1), obtaining civil and criminal penalties, *see, e.g.*, Colo. Rev. Stat. § 6-4-112, -117, securing compensation for direct and indirect purchasers, *see, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), and suing in state court as permitted by the Class Action Fairness Act, *id.*

Private enforcement of the antitrust laws is a key component of both the Sherman Act and state antitrust laws, and is particularly important in FERC regulated markets given FERC's limited ability to deter and compensate victims of anticompetitive harm. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("the private cause of action plays a central role in enforcing this regime"). As this Court recently recognized with regard to private actions under the Lanham Act, private plaintiffs' "awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators," private actions "provide incentives for manufacturers to behave well," and allowing private suits "takes

advantage of synergies among multiple methods of regulation." *POM Wonderful*, 134 S. Ct. at 2238-39 (internal quotation marks omitted).

In sum, petitioners have failed to show any possibility of collision between state antitrust enforcement against the "supreme evil of antitrust" and FERC regulation of natural gas markets. On the contrary, enforcement of state antitrust laws, like the Sherman Act, broadly complements FERC regulation.

CONCLUSION

For the foregoing reasons, and those stated in repondents' briefs, this Court should reject petitioners' field-preemption argument and affirm the decision of the Ninth Circuit.

Respectfully submitted,

RICHARD M. BRUNELL
Counsel of Record
ALBERT A. FOER
SANDEEP VAHEESAN
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
(202) 600-9640
rbrunell@antitrustinstitute.org

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AMICUS CURIAE BRIEF

No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., et al.,

Petitioners,

v.

LEARJET, INC. et al.,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INTERSTATE NATURAL GAS ASSOC. OF AM., NATURAL GAS SUPPLY ASSOC., AND INDEPENDENT PETROLEUM ASSOC. OF AM., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Joan Dreskin
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
20 F St., N.W., Ste. 450
Washington, DC 20001

Dena E. Wiggins
NATURAL GAS SUPPLY ASSOCIATION
1620 Eye St., N.W., Ste. 700
Washington, D.C. 20006

Thomas C. Goldstein
Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Ste. 850
Bethesda, MD 20814
kr@goldsteinrussell.com

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INTEREST OF *AMICI CURIAE*[1]

The Interstate Natural Gas Association of America (INGAA) is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents virtually all of the interstate natural gas transportation pipeline companies operating in the United States, as well as comparable companies in Canada. Its members transport the vast majority of the nation's natural gas through a network of 200,000 miles of pipelines and also operate many interstate natural gas storage facilities. INGAA's members only transport gas; they do not sell it. INGAA's members are regulated by the Federal Energy Regulatory Commission under the Natural Gas Act. INGAA and its individual members have a substantial interest in contract stability, rate certainty, continued investment in energy infrastructure, and in ensuring predictable, rational, and fair law and policy affecting natural gas transportation. To advance those interests, INGAA regularly participates as an *amicus* in cases concerning the proper regulation of the industry. *See, e.g.*, *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008).

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. A blanket consent letter on behalf of all the parties is on file with this Court.

The Natural Gas Supply Association (NGSA) is a trade association that represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers. Members of NGSA account for approximately thirty percent of the domestic natural gas production and are shippers on interstate pipelines. NGSA has previously participated as an *amicus* in cases before this Court. *See, e.g.*, *Morgan Stanley*, 554 U.S. 527.

Since 1929, the Independent Petroleum Association of America (IPAA) has served as a voice for the exploration and production segment of America's oil and natural gas industry, and advocates its members' views before the U.S. Congress, the Administration, and federal agencies. Today, IPAA represents more than ten thousand independent oil and natural gas producers and service companies across the United States. Independent producers develop ninety-five percent of the nation's oil and natural gas wells, produce fifty-four percent of domestic oil and produce eighty-five percent of domestic natural gas. The average independent has been in business for twenty-six years and employs twelve full-time and three part-time employees. IPAA's members are the face of small business in the

oil and natural gas industry and support more than two million direct jobs in the United States.[2]

SUMMARY OF ARGUMENT

The natural gas industry is in the midst of a massive build-out of infrastructure required to take advantage of North America's increasingly abundant supply of domestic energy resources. To permit advantageous use of cleaner burning natural gas – including as a replacement for retiring coal-fired electric generation facilities – the industry will need to spend hundreds of billions of dollars in the next two decades expanding what is, in large part, an inherently interstate system. These expensive, long-term investments require a transparent and stable regulatory environment in which companies easily can discern their legal obligations and the proper regulatory authority for any given activity. The Ninth Circuit's preemption analysis in this case deprives the industry of that needed clarity and certainty.

Until now, knowing whether a particular activity was subject to state or federal control was a relatively straightforward matter. Section 1(b) of the Natural Gas Act (NGA) establishes exclusive federal jurisdiction over interstate transportation of natural gas and the sale in interstate commerce of natural gas for resale (*i.e.*, wholesale sales), as well as over the natural gas companies engaged in those

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[2] This brief represents the position of INGAA, NGSA, and IPAA as organizations, but not necessarily the views of any particular member with respect to any issue.

activities. 15 U.S.C. § 717(b). Section 5 of the Act further authorizes Federal Energy Regulatory Commission (FERC) oversight of "any rule, regulation, practice, or contract affecting" the rate charged for such sales or transportation. *Id.* § 717d(a). Under this Court's decisions, no state could exercise jurisdiction over any matter falling within that authority. On the other hand, as Section 1(b)'s proviso expressly provides, anything *not* falling within federal jurisdiction – such as retail sales – was left to the states. *Id.* § 717(b).

Although the Ninth Circuit's decision is not a model of clarity, it seemingly held that there is an exception to this general rule: even if a practice (like the market manipulation alleged in this case) would otherwise fall within federal jurisdiction under Section 5, states may nonetheless permit private state-law suits against companies for engaging in that conduct so long as the practice is also "associated with" retail prices or other aspects of the natural gas industry left to state control by the Section 1(b) proviso. On that view, even if FERC approved a particular practice, industry participants could be sued in state court on the theory that the practice has a retail effect and violates local law. As this case illustrates, such litigation can be enormously disruptive, putting claims for hundreds of millions of dollars in the hands of local lay juries who may lack the expertise or national outlook required to ensure a properly functioning interstate energy market. The prospect of such litigation necessarily increases the risk (and, therefore, the cost) of the investments required to maintain and expand our natural gas infrastructure. Those costs are ultimately passed on

to consumers and business, with radiating effects throughout the economy.

This is not the scheme Congress intended. The Ninth Circuit over-read Section 1(b)'s proviso, failing to recognize that while Section 5 generally gives FERC authority over practices that "affect" jurisdictional sales, there is no parallel provision giving states jurisdiction over practices that affect, or are otherwise associated with, non-jurisdictional sales. That asymmetry makes perfect sense: because there are any number of practices that have both wholesale and retail effects, giving both states and FERC "affecting" jurisdiction would lead to the inevitable overlapping authority and potential for conflict seen in this case.

The natural gas industry cannot perform its important role if it is forced to discern and comply with the commands for dozens of different masters, all claiming the power to regulate the same practice. Because the Ninth Circuit's analysis permits that untenable result, its judgment should not stand.

ARGUMENT

I. The Natural Gas Act Imposes An Important And Sensible Division Of Power Between The Federal Government And The States.

A well-functioning energy industry is vital to the national economy. The United States has an abundant, diverse supply of natural gas that can be developed prudently and economically, as well as a robust natural gas transportation infrastructure that provides consumers with access to that supply.[3] The enormous increase in proven and probable reserves in North America has generated tangible benefits to consumers in the form of lower home heating and electricity bills, revitalized the United States industrial market, and accelerated the power generation industry's move to cleaner burning natural gas. At the same time, natural gas activity in the United States contributed more than 900,000 jobs to the economy, and generated more than $64 billion in labor income for American workers, in 2012

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[3] *See* Energy Info. Admin., *Annual Energy Outlook 2012 Early Release Overview*, *available at* http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2012).pdf.

alone.[4] The development of shale gas is projected to add 1.4 million more jobs domestically by 2030.[5]

The success of our national energy markets depends in significant part on the maintenance of a sensible, predictable, and stable regulatory regime. The rule seemingly adopted by the Ninth Circuit below is neither sensible nor predictable and would sow uncertainty in the energy industry at a time when confidence and stability are most needed.

A. The Energy Industry Needs Predictability And Clear Lines Of Authority.

By its nature, much of the natural gas industry is extensively interstate. Because natural gas supply basins are broadly situated throughout the country, often far from consumption areas, the interstate sale and movement of natural gas across state lines has long been the norm in most parts of the nation. Over the decades, the natural gas industry has invested trillions of dollars to develop the infrastructure needed to efficiently produce, transport, and

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[4] *See* IHS, Inc., *America's New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy, Volume 1: National Economic Contributions* 25, 32 (Oct. 2012), *available at* http://marcelluscoalition.org/wp-content/uploads/2012/10/IHS_Americas-New-Energy-Future.pdf (hereinafter "New Energy Future").

[5] *See* Consumer Energy Alliance, *North America's New Energy Future* 16 (2012), *available at* http://consumerenergyalliance.org/wp/wp-content/uploads/2012/09/CEA-Report-North-Americas-New-Energy-Future_Full_FINAL_LowRes.pdf.

distribute energy to every corner of the country, often providing energy that is cheaper and cleaner than is locally available.

Due to increased energy demands, coupled with increased domestic supplies of natural gas resources, the natural gas industry is in the midst of a massive expansion of production and transportation capacity. Since 2000 alone, the oil and natural gas industry invested over $2.7 trillion dollars in U.S. capital projects to meet the growing demand for oil and natural gas.[6] That investment has already borne fruit: since 2007, domestic natural gas production has increased nearly twenty-five percent.[7] The government projects that domestic natural gas production will continue to grow for decades to come, increasing by more than fifty percent by 2040.[8]

As a consequence, even while demand for natural gas continues to grow,[9] imports have fallen to their

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[6] *See* Energy Tomorrow, Capital Spending for U.S. Projects, http://www.energytomorrow.org/economy/capital-spending-for-us-projects (hereinafter "Energy Tomorrow").

[7] *See* Energy Info. Admin., U.S. Natural Gas Gross Withdrawals (Aug. 29, 2014), http://www.eia.gov/dnav/ng/hist/n9010us2a.htm (showing 24.6 million cubic feet withdrawn in 2007, compared to 30.1 million cubic feet in 2013).

[8] *See* Energy Info. Admin., *Annual Energy Outlook 2014 With Projections to 2040* A-27 (April 2014), *available at* http://www.eia.gov/forecasts/aeo/pdf/0383(2014).pdf (hereinafter "Energy Outlook 2014").

[9] Energy Info. Admin., U.S. Natural Gas Total Consumption (Aug. 29, 2014), http://www.eia.gov/dnav/ng/hist/n9140us2a.htm.

lowest levels in more than fifteen years.[10] At the same time, the increased production of natural gas has allowed electric utilities to retire many coal-fired generators, replacing them with cleaner burning natural gas generation.[11] That trend is expected to continue, with natural gas accounting for forty-two percent of the projected increase in electricity generation between now and 2040.[12]

To take advantage of the increased availability of this North American resource, the energy industry must undertake further immense capital projects to increase the system's capacity at every stage of production and transportation. A recent INGAA Foundation report projected that the United States and Canada will need to invest $313 billion in the next twenty-two years on natural gas midstream assets, including new mainlines, natural gas storage fields, lateral lines to/from storage, power plants and processing facilities, LNG export facilities, and related equipment.[13] This amounts to more than $14 billion per year through 2035. Another $5.1 trillion

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[10] *See* Energy Info. Admin., U.S. Natural Gas Imports (Aug. 29, 2014), http://www.eia.gov/dnav/ng/hist/n9100us2a.htm.

[11] *See* Energy Outlook 2014, *supra* note 8, at MT-26.

[12] *Id.*

[13] *See* INGAA Found., Inc., *North American Midstream Infrastructure Through 2035: Capitalizing on Our Energy Abundance* 14, 28 (March 18, 2014), *available at* http://www.ingaa.org/Foundation/Foundation-Reports/2035Report.aspx.

in expenditures related to unconventional oil and gas development will also be required.[14]

These massive projects are necessarily long-term investments that require substantial advanced planning. The energy industry is "characterized by long lead times [and] huge capital requirements," with "very real investment risks."[15] Obtaining regulatory approval for, and then building, new facilities can take several years and often much more, and can cost billions. Once completed, these facilities cannot feasibly be moved if they prove unprofitable. And given their great expense, such projects pay for themselves only after many years of operation.

Accordingly, for the energy industry, "[p]lanning and investment cannot be turned on and off like a spigot, without entailing huge, potentially non-recoverable costs and delaying urgently needed projects." [16] Because "the industry must plan and operate under these long lead times, it is hypersensitive to minimizing risk over the course of its investments."[17]

A very material source of risk in the sector arises from regulatory uncertainty. In particular, investors must be assured that the investments they make today will not be rendered unprofitable, or significantly riskier, tomorrow by changes in the

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[14] *See* New Energy Future, *supra* note 4, at 7.

[15] *See* Energy Tomorrow, *supra* note 6.

[16] *Id.*

[17] *Id.*

basic rules of the game or their inconsistent application. It is therefore critical that the industry know who its regulators are, and the scope of the regulators' authority. It is likewise imperative that the industry avoid the potential for conflicting legal obligations that arises when the same practices are subject to regulation by multiple jurisdictions.

B. Congress Intended A Clear, Bright-Line Division Of State And Federal Authority Over The Natural Gas Industry.

Congress enacted the Natural Gas Act, 15 U.S.C. §§ 717-717w, to provide the necessary uniformity and predictability through national regulation of the interstate aspects of natural gas transportation and sales. *See, e.g.*, 15 U.S.C. § 717(a) (finding that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest"). Specifically, the Act removed from state regulation interstate transportation and wholesale sales of natural gas, substituting in its place a federal regulatory regime.

As most relevant here, Section 1(b) of the Natural Gas Act extends federal jurisdiction over interstate transportation of natural gas and the sale in interstate commerce of natural gas for resale, as well as over the natural gas companies engaged in those activities. 15 U.S.C. § 717(b). Section 5 of the Act further authorizes Federal Energy Regulatory Commissions (FERC) oversight over "any rule, regulation, practice, or contract affecting" the rate

charged for such sales or transportation. *Id.* § 717d(a).[18]

In our federal system, what is not reserved to the federal government is left for the states. As a consequence, and as expressly set forth in Section 1(b), states retain authority over "any *other* transportation or sale of natural gas" – such as intrastate sales and transportation, and retail sales – as well as the "facilities used for such distribution" and the "production or gathering of natural gas." 15 U.S.C. § 717(b) (emphasis added).

When it comes to natural gas, "[t]here can be no divided authority over interstate commerce." *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988) (citation and internal quotation marks omitted). Thus, where federal jurisdiction applies, it is exclusive. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988); *Transcon. Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 423 (1986). As a consequence, it is "common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co.*, 487 U.S. at 377 (Scalia, J., concurring in the judgment); *see also id.* at 377 (majority opinion) ("[A] state agency's efforts to

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[18] In describing the scope of federal preemption, this brief refers to "federal jurisdiction" rather than "FERC jurisdiction" because there are some areas Congress has reserved for exclusive federal regulation but has withheld from FERC plenary jurisdiction, for example, leaving the rates for "first sales" to be regulated by market forces. *See Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 421-25 (1986).

regulate" interstate electricity transportation or wholesale sales "must fall when they conflict with or interfere with federal authority over the same activity.") (citation and internal quotation marks omitted).

To be sure, Congress did not intend the federal government to occupy the entire field in which the natural gas industry operates. As noted, states retain jurisdiction over gas production, intrastate transportation, and retail sales. In addition, Congress has deprived FERC of authority over some natural gas sales otherwise falling within exclusive federal jurisdiction, such as "first sales." *See Transcon. Gas Pipe Line Corp.*, 474 U.S. at 412; Pet. App. 25a & n.10. But the fact that FERC has not been given jurisdiction over all sales of natural gas does not diminish the NGA's preemptive effect on state regulations of practices that do fall within the federal government's jurisdiction. *See Transcon. Gas Pipe Line Corp.*, 474 U.S. at 422 (explaining that FERC's inability to "regulate directly the prices" for first sales, "has little to do with whether state regulations that affect a pipeline's costs and purchasing patterns impermissibly intrude upon federal concerns").

Providing exclusive federal jurisdiction over the interstate aspects of the industry thus creates a nationally uniform regulatory regime for a national enterprise, thereby avoiding the confusion, cost, and potential for conflict that would arise if each state could regulate a portion of the inter-related systems or attempt to frustrate the interstate transportation and sale of natural gas for resale by doing indirectly what it could not do directly. *See, e.g.*, *id.* at 423; *N.*

Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91-92 (1963).

II. The Ninth Circuit's Preemption Analysis Contravenes Established Understandings Of The Role Of The State And Federal Governments In The Natural Gas Industry.

The specific result in this case is less important to amici than the rules governing the preemption analysis. On that score, the basis of the Ninth Circuit's decision is not entirely clear. The court of appeals acknowledged that under Section 5, FERC generally has jurisdiction over practices of natural gas companies that affect jurisdictional rates. *See* Pet. App. 24a. At the same time, the court did not question that the index manipulation alleged in this case directly affected jurisdictional rates (it did not, for example, hold that FERC lacked jurisdiction because the connection between the alleged manipulation and jurisdictional rates was too attenuated). Instead, the court held that the plaintiffs' claims were not preempted because they arose from "price manipulation associated with transactions falling outside of FERC's jurisdiction." *Id.*; *see also id.* 31a-32a.

The court never explains what it means by "associated with transactions" falling outside of FERC jurisdiction. It may have meant that the indices reflected some nonjurisdictional sales. Or it may have meant that the indices were used to set prices for nonjurisdictional sales, such as retail sales. Or both. But whatever it meant, the court did not deny that the alleged manipulation was "associated with" *jurisdictional* transactions in the exact same

sense – *i.e.*, the indices reflected, and affected, jurisdictional sales as well. *See* Pet. App. 14a (court of appeals' description of indices); Pet. App. 112a (district court finding that indices "are the method by which jurisdictional rates are set and embody jurisdictional rates").

The Ninth Circuit nonetheless held that respondents' claims were not preempted, reasoning that construing FERC's exclusive jurisdiction to extend to "price manipulation associated with nonjurisdictional sales would risk nullifying the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority over nonjurisdictional sales." Pet. App. 31a-32a. The decision thus seems to hold that the proviso in Section 1(b) reserves to the states authority to regulate any conduct "associated with" nonjurisdictional transactions, even if the conduct would also affect jurisdictional prices sufficient to trigger FERC jurisdiction under Section 5. That interpretation threatens to unravel the careful delineation between state and federal of authority in the NGA.

A. Permitting State Jurisdiction Based On The Retail Effects Of Conduct Otherwise Falling Within Federal Jurisdiction Is Contrary To The Text And Structure Of The NGA.

To the extent the Ninth Circuit believed that the NGA gives the states exclusive jurisdiction over any practice that is "associated with" nonjurisdictional sales, even if the practice is also "associated with"

jurisdictional sales, its analysis turns the statute on its head.

1. Although the Ninth Circuit's interpretation is premised on a supposed reading of the reservation of state authority in Section 1(b), the text of the provision gives it no support. Section 1(b)'s proviso reserves to the states authority over certain practices based on their *nature*, not their *effects*. That is, states retain jurisdiction over the "transportation" or "sale" of natural gas not subject to federal authority, including "local distribution" of natural gas, as well as the "production" and "gathering" of natural gas. So the question the Ninth Circuit should have asked is whether the practices at issue *constitute* a retail sale of natural gas, not whether the practice was "associated with" retail sales.

Congress provided FERC authority over certain practices that "affect" jurisdictional rates in Section 5. But, critically, there is no parallel provision reserving states similar jurisdiction over practices that affect nonjurisdictional rates. Nor can the Section 1(b) provision be read impliedly to provide states such broad authority. To the contrary, this Court has held that "[e]xceptions to the primary grant of jurisdiction in section (1(b)) are to be strictly construed," precluding an expansive interpretation of Section 1(b)'s proviso. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 679 (1954) (alterations in original).

Thus, in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court rejected the claim that the Section 1(b) proviso gave states jurisdiction to regulate a pipeline's curtailment of retail deliveries in times of shortage, despite the

curtailment's obvious effect on direct retail sales (*i.e.*, the curtailment precluded some retail sales from taking place). *See id.* at 637-38. The Court explained that the "proviso of § 1(b) withheld from [FERC's predecessor] only rate-setting authority with respect to direct sales," and did not serve to limit the federal agency's otherwise undisputed authority to regulate transportation of gas from interstate pipelines. *Id.*

Similarly in this case, the Section 1(b) proviso cannot be read impliedly to reserve to the states powers that are otherwise assigned to the federal government. The asymmetry between federal jurisdiction (which includes power over practices that "affect" jurisdictional rates) and the jurisdiction reserved to the states in Section 1(b) (which omits any parallel "affecting" power), is essential to the statutory scheme. Construing Section 1(b) to give states jurisdiction over any practice that affects non-jurisdictional rates, even if the practice also directly affects jurisdictional rates, would create inevitable conflict within the statute and could subject companies to precisely the hodge-podge of regulation Congress intended to spare them.

As this case illustrates, a particular practice may well be "associated with" or affect both jurisdictional and non-jurisdictional rates and practices. For example, a regulated company may wish to issue new securities that will affect its cost structure and, thereby, its rates. *See Schneidewind*, 485 U.S. at 307. If the company makes both jurisdictional and non-jurisdictional sales, the securities issuance could well affect both. In another example, an interstate pipeline may find that it needs to reduce pipeline capacity temporarily (perhaps due to damage from a

natural disaster or equipment outages) and therefore cannot satisfy all of its contractual commitments to deliver gas to its customers. *Cf. La. Power & Light Co.*, 406 U.S. at 624-28 (case in which natural gas shortages led to curtailment of deliveries). The drop in deliveries could affect both wholesale and retail prices.

On the Ninth Circuit's apparent reading, Section 1(b) gives states the exclusive right to regulate such practices on the basis of their retail effect, while Section 5 gives FERC that same exclusive jurisdiction given their effect on jurisdictional sales. Instead of deciding which provision should trump the other, it is far more sensible to read Section 1(b) according to its plain terms, which do not include the broader power of exclusive jurisdiction over every practice "associated with" retail and other non-jurisdictional transactions.[19]

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[19] Of course, Section 5's "affecting" jurisdiction is not unlimited either. FERC may not exercise authority over practices (say, state minimum wage laws) whose effect on jurisdictional rates is unduly attenuated. Nor does Section 5 provide FERC a means to exercise authority that has been expressly withheld from it – for example, the power to set prices for "first sales" or the direct regulation of natural gas production. *See* 15 U.S.C. §§ 717(b), 3431(a)(1)(A), (b)(1)(A); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989). But the Ninth Circuit did not find that the index manipulation alleged in this case was itself a non-jurisdictional retail sale; it based jurisdiction on the belief that the manipulation was "associated with" retail sales. Pet. App. 24a, 31a-32a. As noted, that power is not reserved to the states by Section 1(b).

B. Allowing States Jurisdiction Over Practices "Associated With" Both Retail And Wholesale Sales Would Contravene The Purposes Of The NGA's Establishment Of A Uniform Federal Regulatory Regime.

The Ninth Circuit's apparent holding likewise undermines the basic purposes of NGA preemption.

This Court has repeatedly recognized that "uniformity of regulation . . . was an objective of the Natural Gas Act." *N. Natural Gas Co.*, 372 U.S. at 91-92; *see also, e.g.*, *Transcon. Gas Pipe Line Corp.*, 474 U.S. at 423 (NGA preemption avoids disruption to "the uniformity of the federal scheme" by avoiding the prospect that "interstate pipelines will be forced to comply with varied state regulations of their purchasing practices"). But allowing states exclusive jurisdiction over practices "associated with" retail rates would subject companies to exactly the diversity of potentially conflicting state legal obligations the NGA was intended to eliminate.

Many of the practices that affect both jurisdictional and non-jurisdictional rates have effects in multiple states, giving rise to the prospect that the same conduct would be subject to regulation (and litigation) under the laws of many jurisdictions. This case is an example: the indices at issue are used nationwide and, as a result, their alleged manipulation led to "a series of class action lawsuits . . . filed around the country," Pet. App. 19a, alleging violation of various state antitrust laws, *see id.* at 19a-21a.

The Ninth Circuit's apparent rule could thus subject the same conduct to potentially conflicting regulation by up to 48 different states and the District of Columbia.[20] It is difficult to overstate the practical problems that would arise if that were the law. To start, just determining what those legal obligations are would be burdensome. Companies would first have to discern whether a practice has a sufficient "association" with non-jurisdictional prices to invoke Section 1(b)'s proviso and, therefore, render the practice subject to state regulation. (In this case, for example, even the Ninth Circuit was unable to explain clearly the sense in which the alleged index manipulation was "associated with" non-jurisdictional sales). And even if it were clear that state law governed, determining what that law required could be difficult. As this case illustrates, often the relevant law would arise from broadly written antitrust or consumer statutes. Pet. App. 20a-21a. *See, e.g.*, *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (case brought against energy producers under California's Unfair Competition Code, which prohibits "any unlawful, unfair, or fraudulent business act or practice," Cal. Bus. & Prof. Code § 172000).

As this case also illustrates, enforcement of those disparate state laws could be left to the individual judgments of local lay jurors. Even assuming that lay juries are likely to be able to understand the

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[20] There are no sales of natural gas in interstate commerce in Alaska or Hawaii.

complex matters surrounding many natural gas industry practices, there is every reason to fear that local juries will give greater weight than Congress intended to local interests at the expense of the broader national needs for an effective energy market. *Cf. Lousiana Power & Light Co.*, 406 U.S. at 633 (noting that even expert state regulators can be expected "to regulate in the State, not the national interest").

At the same time, it is possible that in many cases a jury will never be empanelled because of the *in terrorem* effects of lawsuits often seeking hundreds of millions (if not billions) of dollars. By their nature, the activities of energy companies tend to give rise to enormous claims, given the value of the commodities they sell and the vast numbers of individuals and companies with whom they deal. In this case, for example, the practices challenged in the lawsuit affected hundreds of millions (perhaps billions) of dollars' worth of retail sales. *See* Cert. Pet. 24. Under the Ninth Circuit's seeming rule, all a plaintiff's lawyer would need to do in order to realistically threaten litigation before a lay jury in state court is hypothesize an association between an industry practice and retail prices.

Finally, given the nation's integrated national market for the transportation and sale of energy, it may be difficult, if not impossible, to conduct business differently in different states. As a consequence, the practical effect of the Ninth Circuit's rule may well be that companies will be forced to comply with the most restrictive of the various state rules. As a result, practices that the federal government has deemed permissible or even

advantageous for the national economy may be effectively forbidden by a handful of more parochial state regulatory interests.

This kind of legal and financial uncertainty badly interferes with the broad-scale, long-term investments in infrastructure that are needed to promote a healthy national energy system. Uncertainty regarding legal obligations and potential liability increases risk, which both deters needed investment and increases the cost of securing capital, costs that are ultimately passed on to consumers and the broader economy.

C. To The Extent The Ninth Circuit Meant To Authorize Simultaneous Federal Regulation And State Suit Over The Same Practice, That Holding Is Wrong And Even More Destabilizing.

Finally, it seems possible that the Ninth Circuit intended *concurrent* state and federal jurisdiction over practices that affect both jurisdictional and non-jurisdictional sales. That is, although the court of appeals permitted state lawsuits over the alleged market manipulation, it seemingly left open whether FERC had jurisdiction to prohibit (or otherwise regulate) the same conduct. Thus, the court discussed in some detail whether, "[e]ven if FERC did have the statutory authority" to regulate index manipulation associated with retail sales, it had exercised that authority in 2003. Pet. App. 38a. But if the Ninth Circuit had believed that Section 1(b) gave *exclusive* jurisdiction over index manipulation to the states, it would have made no difference whether FERC had, or had not, previously attempted to

regulate that conduct. Perhaps, then, the court of appeals intended to allow FERC the power to regulate index manipulation due to its effects on wholesale prices, while permitting state suits for injuries arising from retail sales.

But that outcome would be even worse. In addition to giving rise to all the problems just discussed, it would also create the possibility that some conduct could be subject to conflicting state and federal law. For example, if FERC authorized a pipeline to increase its tariff rates due to an accounting modification, an industrial end user might bring suit in state court, arguing that it paid too much at retail for the cost of gas due to the pipeline's rate increase at wholesale. Yet this Court has repeatedly held that Congress intended to preclude states from second-guessing federal regulatory decisions, directly or indirectly. *See, e.g.*, *Miss. Power & Light Co.*, 487 U.S. at 375; *Schneidewind*, 485 U.S. at 306-09.

It is no answer that in this case, or any other, state and federal regulations may be substantively consistent. Jurisdiction under the NGA "was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control." *Phillips Petroleum Co.*, 347 U.S. at 681. Where federal law has occupied the field, states may not exercise any authority over the subject matter, including by subjecting companies to suit in state courts for state-defined remedies (which, as petitioners note, may vary dramatically from what federal law deems appropriate, *see* Petr. Br. 32). *See Schneidewind*, 485 U.S. at 305 ("Congress occupied the field of matters relating to wholesale sales and

transportation of natural gas in interstate commerce."); *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible" because "[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."). To hold otherwise would subject companies to much of the risk and uncertainty of broader state jurisdiction, including the cost of litigating in state court whether the state law rules the plaintiffs seek to enforce (or the remedies they seek) are truly consistent with federal law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Joan Dreskin
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
20 F St., N.W.
Suite 450
Washington, DC 20001

Dena E. Wiggins
NATURAL GAS SUPPLY ASSOCIATION
1620 Eye St., N.W.,
Suite 700
Washington, DC 20006

Thomas C. Goldstein
Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Ste. 850
Bethesda, MD 20814
kr@goldsteinrussell.com

September 25, 2014

AMICUS CURIAE BRIEF

No. 13-271

In the Supreme Court of the United States

ONEOK, INC., ET AL.,

Petitioners,

v.

LEARJET, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF KANSAS AND OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Stephen R. McAllister
Solicitor General of Kansas
Counsel of Record
Memorial Hall, 2nd Floor
120 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Amici Curiae
(Additional counsel listed on signature page)

November 2014

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Natural Gas Act preempts general state antitrust laws that do not target the natural gas industry when those laws are applied to a conspiracy that inflated natural gas prices in direct retail transactions to entities such as school districts, hospitals, manufacturers and others?

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INTERESTS OF THE *AMICI* STATES

The *amici* states have several interests at stake in this case. First, the amici states generally have longstanding state antitrust laws to address anticompetitive behavior in order to protect both businesses and consumers in their respective states. Many of these laws in fact predate the Sherman Act, and in many States the Attorneys General play a special and substantial role in enforcing state antitrust norms.

Second, the States long have been the primary regulators of the natural gas industry in most respects. Only when Congress enacted the Natural Gas Act (NGA) in 1938, did the federal government assume primary responsibility and authority for limited sectors of the industry, in particular wholesale transactions and interstate transportation. But the federal government, at least until this case, has always disavowed any intent to preempt state regulation of retail sales of natural gas.

Kansas has one of the largest natural gas fields in the nation, and thus long has regulated the production aspect of the industry, regulation this Court specifically has upheld as not preempted by federal law. *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493 (1989). Kansas, like most states, also regulates retail sales through its antitrust laws, laws that do not target natural gas but apply generally to anticompetitive behavior that can skew and harm retail markets for natural gas. Thus, Kansas is not insensitive to the interests and needs of natural gas producers—a very important industry to Kansas—nor to the interstate transportation of natural gas, with

pipelines crisscrossing Kansas and vast amounts of gas being stored in Kansas at any given time. *In re Appeals of Various Applicants from a Decision of the Division of Prop. Val. of the State of Kansas*, 313 P.3d 789 (Kan. 2013), *cert. denied*, *Missouri Gas Energy, et al. v. Kansas Div. of Prop. Val.*, 135 S. Ct. 51 (2014).

But, like the other *amici* states, Kansas also is sensitive to the interests and needs of its governmental entities, hospitals, manufacturers, and citizens with respect to consumer protection and unfair business practices. This case directly implicates strong state interests in antitrust enforcement and consumer protection more generally, and does so in a context that presents no threat to federal interests, nor any improper threat to natural gas producers and wholesalers. In fact, permitting state antitrust lawsuits in this context will further and complement federal interests.

INTRODUCTION

This case arises from petitioners' conspiracy to inflate the price of natural gas in retail sales to high-volume, direct purchaser consumers such as corporate businesses like Learjet and governmental entities such as the Topeka, Kansas Unified School District. Petitioners conspired to manipulate price indices that in turn determined the prices that these direct retail customers paid for natural gas. The success of the scheme is undeniable; it resulted in skyrocketing prices for natural gas in the relevant time period. After the nature and scope of the conspiracy became clear, these state antitrust lawsuits were brought by respondents, which include manufacturers, public entities, and hospitals.

As the case comes to this Court, the question is whether the NGA creates "field" preemption that precludes these lawsuits. To be clear, petitioners make no claim of "conflict" preemption, nor could they given the concession and settled law that the NGA does not displace application of the federal antitrust laws here. Their argument is that because (1) the NGA gives the Federal Energy Regulatory Commission (FERC) exclusive authority to regulate wholesale transactions and (2) the manipulated indices at issue here were based on fraudulent wholesale transactions, the NGA necessarily preempts state regulation that has *any* connection to price indices in the wholesale market.

That argument is inconsistent with the NGA's plain text, this Court's consistent interpretations of the Act over time, the history behind the NGA, and the dual federal and state regulation that Congress has carefully respected and preserved in this context.

SUMMARY OF ARGUMENT

I. The NGA on its face draws a clear distinction between state and federal power. Section 1(b) provides that federal power applies "to the transportation of natural gas in interstate commerce" and "to the sale in interstate commerce of natural gas for resale." The Act in the same subsection, however, disavows federal preemption of any other aspects of natural gas regulation, plainly stating that it "shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C. § 717(b). Thus, by its own terms, the NGA does not apply either to "retail" sales

of natural gas, nor to the application of state antitrust laws to such sales.

II. This Court's precedent interpreting the NGA emphasizes and has strictly enforced the separation between federal and state regulatory spheres under the Act. As long ago as 1947, the Court stressed that the NGA's words "plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded." *Panhandle Eastern Pipeline Co. v. Public Serv. Com'n of Indiana*, 332 U.S. 507, 516-17 (1947). Given that "[w]hen it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry," *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493, 510 (1989), "[t]o find field preemption [of a state regulation] merely because purchasers' costs and hence rates might be affected would be largely to nullify" the state authority that the NGA so carefully preserves. *Id.* at 514.

Instead, under the NGA, if state regulation of production or retail transactions implicates a practice also affecting wholesale rates, the Court applies *conflict* preemption principles, and not field preemption principles, *Northwest Central*, 489 U.S. at 515, unless the state regulation's "central purpose is to regulate matters that Congress intended FERC to regulate." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 309 (1988). That description does not fit general state antitrust or consumer protection laws. *Cf.* 485 U.S. at 308 n. 11 (suggesting that the NGA would not preempt general "blue sky" laws that govern the registration

and sale of securities sold within the State, even as applied to natural gas companies).

III.A. Finally, the history of state regulatory predominance and later limited federal authority confirm that the Act's plain language should be given effect and that the Court should continue to adhere to the careful and deliberate division of authority Congress has provided in the NGA. There is no dispute that "[t]hree things and three only Congress drew within its own regulatory power .... These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern*, 332 U.S. at 516.

In fact, the "line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses." *Id.* at 517. Furthermore, the "Act, though extending federal regulation, had no purpose or effect to cut down state power." *Id.* Thus, in the NGA, Congress "was meticulous to take in only territory which this Court had held the States could not reach. That area did not include direct consumer sales, whether for industrial or other uses." *Id.* at 519.

B. Instead, state antitrust laws are well within the traditional police power of the States. Even when plaintiffs seek to apply such laws to practices used not only to influence retail prices but also having an effect on wholesale rates, the NGA does not displace such laws absent an actual "conflict" with federal law. There is no conflict in this case, and petitioners do not even argue that there is, nor could they. *Otter Tail Power*

Co. v. United States, 410 U.S. 366 (1973) (the NGA does not preclude the application of federal antitrust laws).

The Kansas antitrust statute, K.S.A. 50 – 112, for example, dates back to 1889, and precedes the Sherman Act. If the Court reads the NGA nonetheless to "field" preempt these traditional and general state laws, that result will essentially undermine the very protections that the political process provided to the States when Congress "carefully divided" federal and state power under the NGA. *Cf. Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985).

ARGUMENT

This Court has never held that the NGA preempts state antitrust laws that apply to retail natural gas transactions, nor should it, absent a clear *conflict* between application of such a law and federal law. In fact, this Court's decisions in the context of the NGA strongly suggest that a state law should not be preempted under the NGA unless such a law both (1) targets the natural gas industry and (2) conflicts with FERC's limited responsibility and *actual regulation* in this area.

I. The NGA Draws A Clear And Sensible Line Between Federal And State Power.

The NGA on its face draws a clear distinction between state and federal power. Section 1(b) provides that federal power applies "to the transportation of natural gas in interstate commerce" and "to the sale in interstate commerce of natural gas for resale." The Act in the same subsection, however, disavows any federal preemption of any other aspects of natural gas regulation, plainly stating that it "shall not apply to

any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C. § 717(b). Thus, by its own terms, the NGA does not apply either to "retail" sales of natural gas, nor to the application of state antitrust laws to such sales.

This Court has recognized and enforced this clear distinction for over 75 years. In *Panhandle Eastern Pipe Line Co. v. Public Serv. Com'n of Indiana*, 332 U.S. 507 (1947), the Court considered "whether Indiana has power to regulate sales of natural gas made by an interstate pipeline carrier direct to industrial consumers in Indiana." *Id.* at 508-509. It is worth noting that, fundamentally, that is the exact same question at issue in this case: Can Kansas and other states apply their general antitrust laws to "sales of natural gas made by an interstate pipeline carrier direct to industrial consumers" such as large companies, hospitals, and school districts?

The same answer is required here as the Court gave in 1947: "We think there can be no doubt of the answer to be given ..., namely, that the states are competent to regulate the sales." 332 U.S. at 514. Importantly, the NGA expressly and deliberately avoided altering the established principle that, "as the decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipeline carrier." *Id.* In fact, "[t]hree things and three only Congress drew within its own regulatory power [in the NGA]," *id.* at 516. "These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale [i.e., wholesale activity];

and (3) natural gas companies engaged in such transportation or sale." *Id.*

As the Court sensibly recognized, the "omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage [of the NGA] was not inadvertent. It was deliberate." 332 U.S. at 516. Thus, the Court reached the only conclusion the NGA permits: "Direct sales for consumptive use of whatever sort were excluded [from the NGA's scope]." *Id.* at 517. As the Court put it, the "line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses." *Id.* Furthermore, the Court emphasized that the NGA "had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective ...." *Id.*

The Court went on to emphasize that it "would be an exceedingly incongruous result if a statute so motivated" were read "to cut down regulatory power and to do sc in a manner making states less capable of regulation than before the statute's adoption." 332 U.S. at 519. Ultimately controlling in this case, is the Court's following observation: "The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take only territory which this Court had held the states could not reach. That area did not include direct consumer sales ...." *Id.*

The NGA "created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level." 332 U.S. at 520. Instead, and

determinative of the claims in this case, the "'primary aim of [the NGA] was to protect consumers against exploitation at the hands of natural gas companies.'" *Id.*

Are the petitioners here arguing that their activities in the relevant time period somehow benefitted consumers of natural gas? Both their well-documented conspiracy and its detrimental effects on a wide range of purchasers and consumers demonstrate otherwise. FERC does have exclusive authority over wholesale transactions, and maybe FERC's failure to identify quickly and pursue the petitioners' anti-competitive conspiracy is bad luck for the wholesale purchasers under the NGA regime, but there is absolutely no reason to immunize petitioners from the consequences of their illegal conduct with respect to direct retail purchasers.

FERC did not approve of the activity at issue here, nor did it regulate in ways that endorsed such activity. There simply is no need to apply "field" preemption here to protect legitimate federal interests, but there is a compelling need to protect state prerogatives and direct purchasers. The Court has made that proposition clear since 1947, and should continue to adhere to it today.

II. This Court's Precedents Consistently And Sensibly Enforce The Line The NGA Draws Between Federal And State Power.

This Court should decline the invitation of petitioners and the United States to construe NGA Section 5(a), 15 U.S.C. § 717d(a), to blur the line that NGA Section 1(b) draws and that this Court has

consistently and carefully enforced for almost 80 years. It does not matter, for purposes of field preemption, whether a state law regulating direct retail transactions also implicates a practice that directly affects wholesale rates. Only a law that (1) targets the natural gas industry in (2) an area the NGA explicitly preserves for federal regulation should be field preempted. State antitrust laws, by definition, cannot and do not satisfy those conditions.

The proposition is amply illustrated by the Court's decision in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), a case that confirms and proves the States' point about the limited scope of NGA preemption. In *Schneidewind*, the Court concluded that a state law which allowed state authorities "to examine a security issuance of a natural gas company to determine whether it is 'to be applied to lawful purposes and ... is essential to the successful carrying out of the purposes," *id.* at 307, improperly interfered with the federal government's exclusive control over wholesale natural gas markets. The Court reasoned that such a state regulation targeting the natural gas industry was preempted because "[i]n short, the things [the state law] is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." *Id.* at 308. Although recognizing that "every state statute that has some indirect effect on rates and facilities of natural companies is not pre-empted," the Court emphasized that the "*central purpose* [of the state law at issue in *Schneidewind*] is to regulate matters that Congress intended FERC to regulate." *Id.* at 309 (emphasis added).

Even so, the Court readily recognized that the law at issue in *Schneidewind targeted* natural gas companies, but that the result would be different if the issue were a state law of *general* applicability regulating *all* industries and businesses. Thus, the Court explained that, "[o]f course, one area FERC does not exclusively control is 'securities regulation' in the traditional sense of the term, i.e., protection of investors from fraudulent or deceptive practices." 485 U.S. 293, 308 n.11. Thus, the Court strongly implied, if not held, that "traditional 'securities regulation' [such as 'blue sky' laws] is not FERC's direct concern" and would not be preempted by the NGA. In contrast, the law at issue in *Schneidewind*, "is not that kind of regulation," *id.*, and instead "applies only to utilities ...." *Id.*

The decision of this Court that most clearly dictates the outcome here is *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493 (1989), decided the Term after *Schneidewind*. As the Court well knows, Kansas sits on top of one of the largest natural gas fields in the nation and probably the world. Thus, Kansas is concerned with production of natural gas, not just consumption. In *Northwest*, Kansas issued a regulation "providing for the permanent cancellation of producers' entitlements to quantities of Kansas-Hugoton gas." 489 U.S. at 497. Producers filed suit, arguing that the Kansas regulation was preempted by the NGA. But this Court disagreed.

Noting that the "natural gas industry is subject to interlocking regulation by both federal and state authorities," 489 U.S. at 506, the Court emphasized that the NGA "carves out a regulatory role for the

States ... providing that the States retain jurisdiction over intrastate transportation, local distribution, and distribution facilities, and over 'the production or gathering of natural gas.'" *Id.* at 507. Rejecting the companies' claim of "field" preemption, the Court pointed out that when "it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry." *Id.* at 510. Congress did not exercise "'the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act." *Id.* (quoting *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-03 (1949)).

Specifically, in *Northwest*, the Court warned sternly and expressly against "an extravagant mode of interpretation" of the NGA that would preclude traditional state regulation of the natural gas industry's production and retail markets simply because elements of those markets also have bleed-over impact on wholesale rates. 489 U.S. at 512. Thus, the Court reasoned that to "find field pre-emption of Kansas' regulation merely because purchasers' costs and hence [wholesale] rates might be affected would be largely to nullify that part of the NGA ... that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations." *Id.* at 514. This Court's observations are even more compelling in the context presented in this case: the Kansas antitrust laws at issue here do not increase producers' costs in any respect; they simply protect direct retail purchasers from unlawful, anticompetitive behavior of natural gas producers.

Thus, as in *Northwest*, even if petitioners' index-reporting practices directly affected wholesale rates, the *only* proper preemption inquiry is not one of "field" preemption but, rather, the question whether the application of Kansas (and other States') general antitrust laws "conflict" with the NGA. *See* 489 U.S. at 515 ("Thus, conflict pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role."). Critically, the Court defined the "conflict" analysis as follows in *Northwest*: conflict preemption applies only "if it is impossible to comply with both federal and state law; if a state regulation prevents attainment of FERC's goals; or if a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *Id.* at 516.

None of those conditions exist in this case. Petitioners cannot and do not claim "impossibility" of compliance with federal and state law (indeed, federal and state antitrust laws apply the same rules and pursue the same goals here). Nor does application of state antitrust laws prevent attainment of FERC's goals, goals which necessarily include precluding anticompetitive conspiracies such as those at issue here. Finally, there is no credible claim that applying state antitrust laws here does not seek to achieve a "proper" state purpose.

Ultimately, there is no basis for a claim that the application of general state antitrust laws here to the natural gas industry's retail sales (just as those laws are and will be applied to other industries' retail sales) somehow contravenes federal interests. The result of

accepting the arguments of the petitioners and the United States is that FERC would have a lot less backup or alternative help in detecting and stopping anticompetitive conspiracies intended to and with the effect of cheating direct natural gas purchasers.

Thus, petitioners effectively want FERC to be the primary government watchdog to identify, investigate, and pursue any anticompetitive sales activities in the natural gas industry, knowing full well that FERC is not equipped or able to catch and prosecute all such conduct on its own. The *amici* States say "effectively" because the arguments petitioners make that state laws affecting any "practice" related to the wholesale market are preempted will give the natural gas industry *ample* room to maneuver in ways that almost always will connect wholesale and resale price practices, leading to a conclusion of NGA preemption on petitioners' theory. Such a result would place more faith in the prosecutorial capacity of a federal administrative agency than the States have acceded to in this context, that Congress has explicitly authorized under the NGA, or that history and experience have proven justified.

III. State Antitrust Laws Of General Applicability Are Fully Consistent With The Purposes And Goals Of The NGA.

Kansas, like many States, prohibits "all arrangements, contracts, agreements, trusts, or combinations between persons made with a view ... to prevent full and free competition ..." in commercial markets. K.S.A. 50 – 112. Thus, such practices are "hereby declared to be against public policy, unlawful and void." *Id.* Such laws have been on the books, in

many States, since *before* the federal Sherman Act was even enacted.

Furthermore, the Kansas Attorney General, like most State Attorneys General, plays a special role in the enforcement of the State's antitrust laws. The Attorney General, for example, can seek a "civil penalty" against violators of the state antitrust laws. *See* K.S.A. 50 – 160 ("the attorney general may petition for recovery of civil penalties").

And States have invoked their antitrust laws against natural gas and electric power companies to challenge anticompetitive activities for over one hundred years. *See, e.g., Attorney General [of New York] v. Consolidated Gas Co. of New York*, 108 N.Y.S. 823 (1908) (seeking to vacate charter of natural gas company that was engaging in monopolistic activities); *State ex rel. Spillman, Atty. Gen. v. Interstate Power Co.*, 226 N.W. 427 (Neb. 1929) (Attorney General challenging monopolistic activity in the electric power industry); *State [of Louisiana] v. United Gas Pub. Serv. Co.*, 150 So. 835 (La. 1933) (state Attorney General pursuing antitrust claims against natural gas company); *Perfecto Gas Co. v. State [of Texas]*, 228 S.W.2d 918 (Tex. 1950) (Texas Attorney General suing several gas companies under Texas antitrust laws); *Younger v. Jensen, et al.*, 605 P.2d 813 (Cal. 1980) (California Attorney General initiating investigation into alleged antitrust violations by natural gas companies in Alaska with respect to gas being marketed in California); *Illinois v. Panhandle Eastern Pipeline Co.*, 935 F.2d 1469 (7th Cir. 1991) (Illinois suing natural gas companies for state antitrust law violations); *Arizona ex rel. Goddard v. El Paso Corp., et*

al., No. CV2003-004677 (Maricopa County Superior Court 2003) (Arizona suing natural gas companies for state antitrust law violations); *Nevada v. Reliant Energy, Inc., et al.*, 289 P.3d 1186 (Nev. 2012) (state law antitrust suit brought by the Attorney General of Nevada). *Cf. Missouri Pub. Serv. Com'n v. ONEOK, Inc.*, 318 S.W.2d 134, 138 (Mo.Ct. App. 2009) (dismissing state law antitrust claims brought by state agency in part because "the action was not brought in the name of the state," *i.e.*, by the Missouri Attorney General).

Furthermore, the Attorney General has a special role when, as here, public entities have "been so injured or damaged by any [anti-competitive] conspiracy." K.S.A. 50 – 162. In such cases, "the attorney general shall have the authority to institute and prosecute any such actions or proceedings on behalf of the state of Kansas or any city, town, or political subdivision [like the Topeka Unified School District, a plaintiff in this case] ...." *Id.* Further evidence that Kansas and other States' antitrust laws are fully consistent with the goals and purposes of federal antitrust laws is the common statutory requirement in many states, including Kansas, that "the Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal antitrust law by the United States supreme court." K.S.A. 50 – 163.

Given the strong and indisputable predominance of state regulation in this area (addressing anti-competitive conspiracies that inflate prices to retail purchasers), coupled with the self-consciously and very deliberately restrained exercise of federal commerce power that Congress enacted in the NGA, the Court

should maintain and continue to enforce the longstanding line it has recognized between federal and state regulatory power in the context of wholesale versus direct retail sales of natural gas. Expanding the NGA beyond its clear terms, undermines the federalism principle of *Garcia v. San Antonio Metropolitan Trans. Auth.*, 469 U.S. 528 (1985), that the political process is where Congress determines how far to extend its commerce power in areas where that body may have the federal power to regulate the States and override contrary state law. Here, Congress very deliberately chose in 1938 not to exercise the full extent of its potential commerce power and, instead, purposely left most regulation of the natural gas industry to the States.

This Court should respect, indeed embrace, the lines that Congress so clearly drew in 1938, and leave any changes in the scope of field preemption effected by the NGA to Congress. *See Panhandle Eastern*, 332 U.S. at 522 ("The ... answer, in case that experience should vary, is the power of Congress to correct abuses in [state] regulation if and when they appear.")

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

November 2014

Respectfully submitted,

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Stephen R. McAllister
Solicitor General of Kansas
Counsel of Record
Memorial Hall, 2nd Floor
120 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Amici Curiae

Michael C. Geraghty
Attorney General of Alaska

Thomas C. Horne
Attorney General of Arizona

Dustin McDaniel
Attorney General of Arkansas

George Jepsen
Attorney General of Connecticut

David M. Louie
Attorney General of Hawaii

Lawrence G. Wasden
Attorney General of Idaho

Janet T. Mills
Attorney General of Maine

Martha Coakley
Attorney General of Massachusetts

Bill Schuette
Attorney General of Michigan

Lori Swanson
Attorney General of Minnesota

Jim Hood
Attorney General of Mississippi

Jon Bruning
Attorney General of Nebraska

Catherine Cortez Masto
Attorney General of Nevada

Joseph A. Foster
Attorney General of New Hampshire

Gary K. King
Attorney General of New Mexico

Michael DeWine
Attorney General of Ohio

Peter F. Kilmartin
Attorney General of Rhode Island

Herbert H. Slatery III
Attorney General of Tennessee

Robert W. Ferguson
Attorney General of Washington

J.B. Van Hollen
Attorney General of Wisconsin

AMICUS CURIAE BRIEF

No. 13-271

In the Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,
Petitioners,

v.

LEARJET, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF NOBLE AMERICAS ENERGY SOLUTIONS, NOBLE AMERICAS CORPORATION, AND NOBLE AMERICAS GAS & POWER, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SEAN D. JORDAN
Counsel of Record
KENT C. SULLIVAN
PETER C. HANSEN
SUTHERLAND ASBILL & BRENNAN LLP
One American Center
600 Congress, Suite 2000
Austin, Texas 78701
sean.jordan@sutherland.com
(512) 721-2679

QUESTION PRESENTED

The Natural Gas Act occupies the field as to matters within its scope, preempting state regulation aimed at practices that directly affect the wholesale natural gas market. Respondents brought state-law claims against natural gas companies, seeking to impose liability based on industry practices that directly affected prices in the wholesale market. And yet the Ninth Circuit held that Respondents' claims were not preempted because Respondents' alleged damages resulted from retail gas purchases, which fall outside federal jurisdiction.

The question presented is: Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions?

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INTEREST OF *AMICI CURIAE*[1]

Noble Americas Energy Solutions ("NES") supplies power and natural gas to retail customers' sites throughout the United States. It tailors its products and services to capture the benefits of deregulation while protecting its customers from unexpected increases in energy prices. Its cutting-edge risk management programs are flexible and designed to meet the unique needs of customers while providing a wide range of solutions to help meet or beat their budget goals for energy expenses.

NES is active in 20 states serving 2,000 customers behind 50,000 meters with a peak electric load in excess of 7,500 MW and natural gas load of 60,000 mmbtu/day in the west. NES offers commercial and industrial businesses energy commodity products and services to help them successfully manage their costs in volatile energy markets. NES provides customers with an integrated mix of services such as commodity supply, risk management, portfolio management, energy information management, scheduling, settlements and billing management.

Noble Americas Corp. ("NAC") is a commodity marketing and trading company specializing in commodity supply chain management services for

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1. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the petroleum products/crude oil, industrial metals/coal, logistics and shipping, and energy sectors. Operating from over 140 locations worldwide, NAC has built an energy platform that encompasses key global locations and which continues to grow, seeking new ways to create cross-divisional and cross-segment products and services. NAC handles the range of liquids and hard energy sources from thermal coals to gas and electricity.

Noble Americas Gas & Power ("NAGP") is a FERC-regulated power and gas marketer. NAGP transacts for its own account and acts as a wholesale marketer of electricity, natural gas, and natural gas liquids, and has sold, marketed, and traded wholesale power, capacity, ancillary services, related services, and wholesale natural gas in various markets in the United States and Canada. NAGP is a full service, natural gas and electricity marketing and trading business that caters to the physical supply needs of the North American gas and power markets and manages the price risk, credit and operational risk of its customers. The team leverages an extensive customer base and principal investments in strategic pieces of the production and logistics chain to generate steady returns and to gather critical market data for further profit growth. NAGP is now the fifth largest seller of electricity in the United States.

As energy market participants, *amici* NES, NAC, and NAGP rely upon the clear, established lines of

authority between federal and state regulation as defined by the Natural Gas Act, the Federal Power Act, and this Court's interpretive decisions. In regard to the natural gas market, *amici* have long understood that the Federal Energy Regulatory Commission (FERC) is solely charged with regulating any practices that affect wholesale gas prices, and that participants in this market should accordingly conform their actions to FERC's guidance. Likewise, FERC has traditionally been understood to exercise exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.

The Ninth Circuit's decision in this case has undermined the continuing validity of this regulatory framework, creating significant uncertainty for *amici* going forward. For these reasons, *amici* have a substantial interest in this Court's review of the Ninth Circuit's interpretation of preemption doctrine under the NGA.

SUMMARY OF ARGUMENT

This Court has repeatedly recognized the importance of uniform federal regulation under the Natural Gas Act. But the "transactional approach" adopted by the Ninth Circuit allows the States to aggressively impose their own policies on natural gas wholesale practices that impact a retail transaction. The Ninth Circuit's decision is both irreconcilable with this Court's precedent and out of step with

FERC's uniform regulation of practices affecting price indices.

To begin with, it is beyond serious dispute that the alleged price index manipulations in this action directly affect wholesale rates. As Respondents' expert explained, "the prices that were the subject of the manipulation *are* the prices of natural gas in this country." J.A. 593. (Decl. of Michael Harris in support of plaintiffs' motion for class certification) (emphasis added). Likewise, the District Court correctly explained that the indices "are the method by which jurisdictional rates are set and embody jurisdictional rates. Thus, manipulation of the indices directly affects jurisdictional rates." Pet. App. at 111a–112a.

The Ninth Circuit nevertheless held that Respondents' claims were not preempted because they arose from the retail purchase of natural gas. But the Ninth Circuit's transactional approach necessarily contemplates state regulation of practices directly affecting wholesale rates. This Court has made clear that such state regulations are preempted: "The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (internal citation omitted).

Significantly, the preemption issues here are not abstract. Rather, FERC has investigated in great depth the practices at issue in this case and, pursuant to its statutory authority, adopted a code of conduct governing such practices. Under the Ninth Circuit's transactional framework, FERC's carefully crafted scheme would be largely undermined. Because natural gas market participants' conduct would be subject to varying laws of the States whenever a retail purchase was based on or affected by a price index, FERC's uniform standards would be effectively nullified. Consistent with its own established precedent and practical regulation of the energy industry, this Court should reverse.

ARGUMENT

I. THE PRACTICES CHALLENGED BY RESPONDENTS, ALLEGED MANIPULATION OF THE PRICE INDICES, DIRECTLY AFFECT WHOLESALE NATURAL GAS RATES.

When Congress passed the Natural Gas Act (NGA), it determined that FERC would have exclusive regulatory authority over wholesale natural gas pricing issues, preempting any state regulation of the wholesale market.[2] This case raises the question whether the NGA preempts Respondents' state-law antitrust claims concerning

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2. In industry parlance, wholesale natural gas sales are referenced as "jurisdictional" sales, and retail sales are referenced as "non-jurisdictional" sales.

Petitioners' alleged manipulation of gas prices during the western energy crisis from 2000 to 2002.

Specifically at issue in the underlying lawsuits are the assertions of Respondents (retail buyers of natural gas) that Petitioners manipulated natural gas price indices, artificially raising the prices paid by Respondents for retail purchases of natural gas. *See In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 723-25 (9th Cir. 2013). The Ninth Circuit's decision that Respondents' state-law antitrust claims are not preempted by the NGA turned on its focus on the specific retail (non-jurisdictional) sales complained of by Respondents. *Id.* at 731.

But FERC has exclusive authority over any practices affecting rates charged by natural gas companies in connection with the interstate sale of natural gas for resale. 15 U.S.C. § 717d(a). Thus, central to the Court's decision in this case will be its understanding of the operation of price indices in the natural gas market, and whether and how those indices affect both wholesale (jurisdictional) and retail (non-jurisdictional) sales. As *amici* demonstrate below, the manipulation of price indices that are used to establish rates in both jurisdictional and non-jurisdictional natural gas transactions is a practice that necessarily and directly affects jurisdictional rates.

A. FERC Regulates the Restructured Natural Gas Industry by Promoting Competitive Markets and Correcting Market Rules as Needed.

Both the natural gas and electricity industries perform three principal functions in delivering energy to consumers: (1) producing the basic energy commodity; (2) transporting the commodity through pipelines or over power lines; and (3) distributing the commodity to the final consumer. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-275, *Natural Gas and Electricity Markets, Federal Government Actions to Improve Private Price Indices and Stakeholder Reaction* (2005) (hereafter "GAO Report"). Historically, natural gas companies built networks of pipelines to deliver natural gas from where it was produced to the markets where local distribution companies served all local customers. Similarly, many local utilities in the electricity sector built their own systems of power plants and electricity transmission and distribution lines to serve the needs of all consumers in their local areas. *Id.* These local monopolies were overseen by state regulators, who restricted the entry of new companies and also approved investments, approved prices paid by customers, and determined the profit opportunities of these utilities. *Id.*

But due to rising prices and technological, economic, and policy developments beginning in the 1970s, the natural gas and electricity industries have

restructured from a regulated environment to one that places greater reliance on competition to determine entry, investment, process, and profits. *Id.*; *see also* David B. Spence & Robert Prentice, *The Transformation of American Energy Markets and the Problem of Market Power*, 53 B.C. L. Rev. 131, n.74 (2012) ("The impulse to restructure both the electric and the gas industries was part of a trend in economic thinking in the 1970s and 1980s that observed increased faith in the ability of markets to achieve efficient outcomes through competition and reduced faith in the ability of governments to achieve efficient outcomes through regulation.").

The enactment of the Natural Gas Policy Act of 1978, the Natural Gas Wellhead Decontrol Act of 1989, and subsequent FERC orders opened access to pipelines and required pipeline companies to completely separate transportation, storage, and sales services, all of which facilitated the shift of natural gas to more competitive markets. GAO Report. Likewise, the Public Utility Regulatory Policies Act of 1978 and the Energy Policy Act facilitated restructuring in the electricity industry. *Id.* In 1992, FERC ordered full unbundling of gas transmission services from gas sales by all pipelines.[3]

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3. *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13,267, 13,270 (FERC Apr. 16, 1992) (to be codified at 18 C.F.R. pt. 284); *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol; Order Denying*

After these changes, pipeline customers were free to buy their gas at the best available price, hiring the pipeline only to transport the gas at posted, regulated rates.[4]

Formerly, to ensure that the prices utilities charged were just and reasonable, FERC had regulated rates by basing the prices on the utilities' costs to provide service plus a fair return on investment. Now, FERC seeks to ensure that the wholesale natural gas and electricity prices are just and reasonable by promoting competitive markets, issuing market-related rules that encourage efficient competition, and enforcing and correcting market rules as needed. GAO Report.

B. The Manipulation of Price Indices Necessarily and Directly Affects Both Jurisdictional and Non-Jurisdictional Sales of Natural Gas.

The physical trading of natural gas consumed in the United States happens mostly at twenty-four American trading hubs, such as the Henry Hub in Louisiana, and a few additional hubs in Canada. *See* U.S. ENERGY INFO. ADMIN., Office of Oil & Gas,

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Rehearing and Clarifying, Order Nos. 636 and 636-A, 57 Fed. Reg. 57,911, 57,914 (FERC Nov. 27, 1992).

4. Aware of the potential for sellers of gas to abuse market power, FERC granted this authority only to sellers that were unaffiliated with pipelines. FERC *Blanket Marketing Certificates*, 18 C.F.R. § 284.402 (2011).

Natural Gas Market Centers: A 2008 Update 1, 7 fig.3 (2009). The Henry Hub, which is interconnected with 13 different intra-and interstate pipelines, provides the benchmark price for North American natural gas. AM. PETROLEUM INST., *Understanding Natural Gas Markets* (2014).

Participants in the natural gas market buy and sell natural gas through "spot" transactions every day at trading points across North America. These "spot" transactions involve the buyer agreeing to pay a negotiated price for the natural gas to be delivered by the seller at a specified delivery point. *Id.*

In addition to such daily spot transactions, monthly spot transactions are often entered during the last five business days of the month, known in the industry as "bid week." During this time, buyers and sellers negotiate the purchase and sale of natural gas to be delivered throughout the coming month, including making delivery arrangements for pipelines. *Id.* Finally, natural gas is often purchased through longer-term contracts that provide for delivery of gas over a specified period of time, which can vary. *Id.*

For all of these transactions, which involve both wholesale (jurisdictional) and retail (non-jurisdictional) sales of natural gas, many energy market participants rely on price information obtained from price indices published in the trade press. GAO Report; *see also Policy Statement on*

Natural Gas and Elec. Price Indices, 104 F.E.R.C. ¶ 61,121, at 61,404 (July 24, 2003) ("Price indices are widely used in bilateral natural gas and electric commodity markets to track spot and forward prices. They are often referenced in contracts as a price term."). A number of trade publications provide index prices based on their survey of natural gas buyers and sellers to determine the prices they pay (or receive) for natural gas in daily or monthly transactions. AM. PETROLEUM INST., *Understanding Natural Gas Markets*.

Market participants use these indices to, among other things, help them make informed decisions about buying natural gas. For example, energy market participants use price indices as a benchmark in reviewing the prudence of gas purchases and often reference price indices in the contracts they develop for such purchases. GAO Report; *see also* FERC *Initial Report on Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-000, at 35 (Aug. 2002) (explaining that "the natural gas and electricity industries rely on the prices published by the reporting firms as the actual forward prices for contract settlements, and many contracts are indexed to the published prices").

Notably, the indices are used for every type of natural gas sale, including wholesale and retail transactions. *See* FERC *Report on Natural Gas and Electricity Price Indices*, Docket Nos. PL03-03; AD03-

7-004, at 7 (May 5, 2004) (noting that "[n]atural gas producers, local distribution companies (LDCs), and others tend to buy at index-linked prices in lieu of negotiating fixed prices"); *see also* GAO Report (describing the confidence of "industry stakeholders" in the price indices and referencing, *inter alia*, "producer[s]," "marketer[s]," and "industrial consumer[s]"); *see also* J.A. 150-151. In fact, the use of index prices as contractual terms is so widespread that FERC has previously expressed concern that there be an adequate number of fixed-price contracts to form the basis of the index price. FERC *Report on Natural Gas and Electricity Price Indices* Docket Nos. PL03-03; AD03-7-004, at 7; *see also* J.A. 645 (documenting thousands of wholesale index-rate contracts during the time period 2000-2002). In short, "index dependencies permeate the energy industry." 104 F.E.R.C. at 61,404.

Thus, as the District Court correctly concluded in this case, when the price indices are subject to manipulation, both jurisdictional and non-jurisdictional prices are necessarily affected. Pet. App. 110a-111a; *see also id.* at 111a-112a ("[M]anipulation of the indices is not insignificant or tangential to jurisdictional rates. Although the indices are not themselves jurisdictional rates, they are the method by which jurisdictional rates are set and embody jurisdictional rates. Thus, manipulation of the indices directly affects jurisdictional rates.").

Respondents' expert agreed. Noting that the price indices "are widely used by private parties and government agencies and are the reference points and thus basis for natural gas transactions throughout North America," he explained why the challenged practices at issue in this case cannot be divided into retail transactions versus wholesale transactions: "[I]f a Defendant has manipulated price indices, everyone who purchases natural gas based on that price index will be harmed . . . all purchasers who bought at that price index will be harmed because they have purchased at a price that does not reflect the competitive dynamics of the market." J.A. 613 (Decl. of Michael Harris In Support of Respondents' Motion for Class Certification).[5]

In sum, because the natural gas price indices are used pervasively to price both wholesale and retail natural gas transactions on a daily basis, any successful manipulation of the indices would necessarily affect the entire market, including jurisdictional sales.

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5. Respondents' expert further explained that, to the extent Petitioners' were allegedly successful in manipulating the price indices and "created artificial prices," the altered prices were "not customer specific but rather market prices observed and relied upon by all." J.A. 615 (Decl. of Michael Harris In Support of Respondents' Motion for Class Certification).

II. RESPONDENTS' STATE-LAW CLAIMS ARE PREEMPTED BY THE NGA.

Because index manipulation affects the entire market, Respondents' state-law claims are preempted. It is well-settled under this Court's precedent that the NGA grants exclusive federal jurisdiction over practices directly affecting wholesale natural gas rates. Indeed, the federal regulatory scheme leaves no room for even indirect state regulation of practices affecting wholesale gas rates.

Moreover, all of the conduct at issue in this case is in fact regulated by FERC pursuant to its statutory authority, further confirming that this action is barred by preemption. As the Ninth Circuit's decision rests on a transaction-based test that is irreconcilable with this Court's precedent, it should be reversed.

A. The NGA Grants Exclusive Federal Jurisdiction Over Practices Directly Affecting Wholesale Natural Gas Rates.

Congress enacted the NGA to regulate interstate natural gas transportation via pipelines and the sale of natural gas for resale by local utilities. The NGA clearly demarcates between the federal and state regulatory domains, with the federal government—through FERC, formerly known as the Federal Power Commission—having exclusive control over,

among other things, "the sale in interstate commerce of natural gas for resale for ultimate public consumption" and the "natural-gas companies engaged in such . . . sale." 15 U.S.C. § 717(b).

Any entity that is "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale" is a "natural gas company" subject to FERC jurisdiction under the NGA, *id.* § 717a(6), regardless of the other activities in which the entity may be engaged.

The NGA gives FERC broad authority over these natural gas companies. *See* 15 U.S.C. § 717. To engage in wholesale transactions, a natural gas company must obtain FERC's authorization in the form of a certificate of public convenience and necessity. *Id.* § 717f(c)(1)(A). FERC is authorized to create rules and regulations that govern the conduct of natural gas companies holding these certificates. *See id.* §§ 717f(e), 717o. Consequently, FERC has "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," and over the conduct of natural gas companies participating in the wholesale natural gas markets. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988); *see also Illinois Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 507 n.1 (1942).

Thus, under the text of the NGA, FERC has exclusive authority to regulate (i) the rates for

wholesale gas transactions and (ii) any practices directly affecting those rates.[6]

B. The NGA Preempts Respondents' Claims.

In interpreting the NGA, this Court has held that "[t]he federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas or for state regulations which would indirectly achieve the same result." *N. Natural Gas Co.*, 372 U.S. at 91 (citation omitted). In other words, Congress "enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Id.* (citation omitted); *see also Schneidewind*, 485 U.S. at 300.

Where, as here, a federal law occupies a field of commerce, it preempts the operation of all state laws in that field: "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). And preemption applies with equal force whether the state law takes the form of a legislative enactment or an award of damages through private suit. *Riegel v. Medtronic,*

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6. FERC is also empowered by the NGA to propose and assess civil penalties for violations of the NGA or regulations promulgated under the NGA's authority. *See* 15 U.S.C. § 717t–1; *see also* FERC, *2013 Report on Enforcement*, Docket No. AD07-13-006 (Nov. 21, 2013).

Inc., 552 U.S. 312, 325 (2008); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959).

Moreover, from a preemption standpoint it does not matter whether the alleged conduct is regulated only partially by the federal government. Where Congress has occupied the field, state law is preempted whenever "'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)); *accord Schneidewind*, 485 U.S. at 310 n.13.

And as Petitioners have noted, Pet. Br. 29-30, in this case there is also an "'imminent possibility of collision between'" state and federal regulation of activities and practices related to natural gas price indexes, which "'further demonstrates the NGA's complete occupation of the field that [Respondents' suits] seek[] to regulate.'" *Id.* (quoting *Schneidewind*, 485 U.S. at 310). Pursuant to its authority under the NGA to issue certificates of public convenience and necessity, FERC has issued blanket marketing certificates for all natural gas companies to make wholesale sales. Order No. 644, *Amendments to Blanket Sales Certificate*, 105 F.E.R.C. ¶ 61,217, at P 2; *see also* 18 C.F.R. § 284.284(a); 18 C.F.R. § 284.402(a). In 2003, FERC—pursuant to its power under sections five,

seven, and sixteen of the NGA—"made explicit what was once implicit" by amending these blanket certificates to include a Code of Conduct. *See* Order No. 644, 105 F.E.R.C. ¶ 61,217 at P 2 (Nov. 17, 2003); *Order Denying Rehearing of Blanket Sales Certs.*, 107 F.E.R.C. ¶ 61,174 at 61,695 (May 19, 2004).

The Code of Conduct regulates the alleged conduct on which Respondents' claims rest. 105 F.E.R.C. ¶ 61,217, at P 7-14. Specifically, Respondents have complained about "wash trades," which are prohibited by the Code of Conduct and defined as "[p]re-arranged offsetting trades of the same product among the same parties . . ." *Id.* at P 11-12; 107 F.E.R.C. at 61,695. Respondents' assertions regarding alleged false reports to index publishers and collusion are also governed by the Code of Conduct. 105 F.E.R.C. ¶ 61,217, at P 58-73; 107 F.E.R.C. at 61,696; 18 C.F.R. § 284.403(b).

In sum, all of the conduct at issue in this case is conduct that FERC regulates pursuant to its statutory authority over "the process by which price indices influence and reflect the formation of wholesale prices for natural gas and electricity." *See* 104 F.E.R.C. at 61,403. FERC's statutory authority and actual exercise of that authority to regulate the Petitioners' alleged conduct confirms that Respondents' claims are barred by preemption.

C. The Ninth Circuit's "Transactional Approach" Is Irreconcilable With This Court's Precedent.

Contrary to the text of the NGA and this Court's precedent, the Ninth Circuit adopted a "transactional" theory to determine whether Respondents' claims were preempted. Under the Ninth Circuit's approach, preemption turns on the question whether a state-law claim concerns natural gas purchases made at retail or wholesale, rather than whether the actual conduct or practice at issue affects wholesale gas prices. *See In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 731 (9th Cir. 2013) ("federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction."). Employing its transactional analysis, the Ninth Circuit concluded that, because Respondents' state-law claims arise from retail purchases of natural gas, they are not preempted by the NGA. *See id.*

The Ninth Circuit's transactional preemption test is irreconcilable with this Court's precedent because it necessarily contemplates state regulation, albeit indirect regulation, of practices affecting wholesale gas prices. This Court, however, has made clear that "The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same

result." *N. Natural Gas Co.*, 372 U.S. at 91 (internal citation omitted).

In other words, "The Natural Gas Act precludes not merely direct regulation by the States." *Id.* Rather, through the NGA "Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.'" *Id.* (quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)). Thus, the Court has concluded that a Kansas conservation regulation—traditionally a function of state power—was preempted because it dealt "with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act." *Id.* at 91–92.

Similarly, in *Schneidewind* the Court addressed a Michigan statute requiring companies that transported natural gas in-state to obtain state approval before issuing securities. At the outset, the unanimous Court explained the "well-settled" principle that "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." 485 U.S. at 305. Therefore, the question was whether the Michigan statute attempted to regulate practices

within an exclusive federal domain. *Id.* The Court concluded that the statute was preempted because, "[i]n short, the things Act 144 regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." *Id.* at 308.

Significantly, the Court noted that the *Schneidewind* petitioners' reliance on its earlier decision in *Rice v. Santa Fe Elevator Corp.* was misplaced, because "The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Schneidewind*, 485 U.S. at 310 n.13 (quoting *Rice*, 331 U.S. 218). Thus, *Schneidewind* confirmed that preemption analysis under the NGA turns on whether the subject matter that the state law attempts to regulate affects jurisdictional sales, and not whether a particular transaction at issue was jurisdictional or non-jurisdictional. Because the Ninth Circuit's decision here turns this approach to preemption analysis on its head, focusing only on whether the transactions at issue were jurisdictional or non-jurisdictional, it runs directly afoul of *Schneidewind*.

Further, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988), the Court specifically addressed a preemption scenario very much like the circumstances presented

here.[7] Confronting an industry practice that affected both wholesale and retail rates, the Court concluded that "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates." *Id.* at 371. *Mississippi Power* involved rate-setting with regard to electricity pools where the entities wholesaling the power were also purchasing and retailing the power. The Court held that the Mississippi Supreme Court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings." *Id.* at 374. The Court explained that it has "long rejected this sort of case-by-case analysis of the impact of state regulation upon the national interest." *Id.* The same concerns mandate rejection of the Ninth Circuit's transactional framework here, which would unmoor FERC's jurisdiction from the challenged practices and substantially undermine the uniformity of federal regulation.

Thus, consistent with the text of the NGA, the Court's established, pragmatic approach to preemption asks whether the actual practice being

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7. Although *Mississippi Power* was a Federal Power Act (FPA) preemption case, the Court has confirmed that "the relevant provisions of [the FPA and the NGA] are in all material respects substantially identical," and the Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

regulated affects jurisdictional sales, not whether the particular transactions at issue involved only non-jurisdictional sales.[8] Because the Ninth Circuit's decision rests on the application of a different, transaction-based preemption test that directly contravenes this Court's precedent, it should be reversed.

III. LEFT UNDISTURBED, THE NINTH CIRCUIT'S TRANSACTIONAL APPROACH TO PREEMPTION UNDER THE NGA WILL SUBSTANTIALLY UNDERMINE UNIFORMITY OF REGULATION.

"Uniformity of regulation . . . was an objective of the Natural Gas Act." *Schneidewind*, 485 U.S. at 310. As such, this Court has held that "State regulation of production may be preempted as conflicting with FERC's authority over interstate transportation and rates . . . if state regulation prevents attainment of FERC's goals." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 516 (1989).

Here, FERC has investigated in great depth the practices at issue in this case and adopted a code of conduct with regard to the submission of information to the indices. *See supra* Part II.B. As FERC has explained, its standards for the reporting of

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8. *See, e.g., Schneidewind*, 485 U.S. at 310; *N. Natural Gas Co.*, 372 U.S. at 91; *Transcon. Gas Pipe Line Corp. v. State Oil and Gas Bd. of Miss.*, 474 U.S. 409, 419, 423 (1986); *Ark. La. Gas Co.*, 453 U.S. at 579.

information to indices "provide a measure of regulatory certainty" and should "encourage more industry participants to contribute to the formation of price indices." 104 F.E.R.C. at 61,404. But left undisturbed, the Ninth Circuit's transactional framework for assessing preemption under the NGA would substantially undermine FERC's regulation of price index reporting by imposing a myriad of state schemes governing the same interstate wholesale practices.

Specifically, the Ninth Circuit's approach necessarily contemplates that the States may aggressively impose their own policies on natural gas wholesale practices that impact a retail transaction. This would plainly negate uniform federal regulation of the same practices. *See Nevada ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186, 1193 (Nev. 2012), cert. denied, 133 S.Ct. 2853 (2013) ("the conclusion that there is no preemption leads to the imposition on interstate natural gas wholesalers 50 different sets of state rules concerning anti-competitive behavior. . . . the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market") (citing *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010)).

Significantly, in 2003 FERC wrote that "investigations of false reporting to price index developers has led some market participants to curtail their reporting, resulting in a decline in the

number of trades voluntarily reported to index developers." 104 F.E.R.C. at 61,404. FERC went on to note that this development "raised concerns about a lack of information about liquidity and whether market participants were making their decisions without adequate or accurate information about how many actual transactions were used to set the price." *Id.* Because of these concerns, FERC set out a safe harbor policy pertaining to the good faith submission of information to price indices. *See generally id.*

The Ninth Circuit's decision imperils the efficacy of this safe harbor created by FERC. Under its transactional approach to preemption, the submission of information to the indices in compliance with FERC's uniform regulatory policies would not necessarily protect a market participant from liability. Rather, so long as retail purchases were associated with such information, market participants would be at risk of running afoul of any number of States' antitrust laws and regulatory frameworks.[9] Given the uncertainties created by such a regulatory atmosphere, market participants who continued reporting information to indices

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9. Likewise, market participants would be subject to inconsistent time frames during which they might be subject to being sued under the varying statutes of limitation applicable to the States' antitrust laws. *See, e.g.*, COLO. REV. STAT. § 6-4-118 (four years); KAN. STAT. § 60–512(2) (three years); WIS. STAT. § 133.18(2) (six years). These enforcement inconsistencies would generate uncertainty that would likely be reflected in higher consumer prices.

would have to try to conform to the most restrictive States' regulations, requiring built-in costs of compliance. The predictable result would be that: (1) the NGA's goal of uniform regulation would be effectively thwarted; (2) the index prices and market prices more generally would be unfavorably skewed to account for the greatly expanded liability risks imposed on market participants; and (3) market participants would be more reluctant to submit information to the indices, rendering them less reliable and the market, in turn, less efficient.

Finally, in addition to creating the safe harbor provision, FERC prohibited acts "intended to . . . manipulate market prices" that "are without a legitimate business purpose." 68 Fed. Reg. at 66,327. FERC explained that "we believe that not only is the inclusion of the phrase ["legitimate business purpose"] necessary, it acts to ensure that such sellers acting in a pro-competitive manner will be able to show that their actions were not designed to distort prices or otherwise manipulate the market." *Id.* at 66,328. This standard "is clearly intended to give sellers some latitude in determining their business actions, while safeguarding market participants." *Id.* at 66,327. Moreover, the code of conduct was drafted "so that it does not create uncertainty" or "disrupt competitive commodity markets." *Id.* at 66,324.

But under the Ninth Circuit's transactional approach to preemption FERC's carefully structured

regulatory framework would be largely undone. Because natural gas market participants' conduct would be subject to the varying anti-competitive laws of the States whenever retail transactions were involved, FERC's "uniform" standard regarding sellers acting in a pro-competitive manner would, in many cases, be effectively nullified.

In short, because the Ninth Circuit's decision creates the "imminent possibility of collision between" state and federal regulation of price index manipulation and reporting, *Schneidewind*, 485 U.S. at 310, it should be reversed.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted.

SEAN D. JORDAN
Counsel of Record
KENT C. SULLIVAN
PETER C. HANSEN
SUTHERLAND ASBILL & BRENNAN LLP
One American Center
600 Congress, Suite 2000
Austin, Texas 78701
sean.jordan@sutherland.com
(512) 721-2679

September 25, 2014

AMICUS CURIAE BRIEF

No. 13-271

IN THE

Supreme Court of the United States

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION

ONEOK, INC., *et al.*,

Petitioners,

v.

LEARJET, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
MARKHAM S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by end users who purchased gas in retail transactions?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 13-271

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual and business civil liberties, a limited, accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this Court in cases involving preemption issues, to point out the economic inefficiencies that often result when multiple layers of government seek to regulate the same activity. *See, e.g.*, *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs'*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; blanket letters of consent have been lodged with the Clerk.

Legal Comm., 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). WLF also participates in important preemption cases where liability under state tort laws threatens the predictability and uniformity provided by federal regulatory schemes. *See, e.g., Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state antitrust law, imposes upon an entire industry an unnecessary layer of regulation that frustrates the objectives or operation of specific regulatory regimes, such as (in this case) the Natural Gas Act (NGA) and the Federal Energy Regulatory Commission (FERC). In this case, the rule adopted by the Ninth Circuit exposes natural gas companies to massive state regulation—in the form of state antitrust liability—for conduct that is the exclusive province of a comprehensive federal regulatory regime.

WLF is also concerned that the Ninth Circuit's approach to preemption under the NGA would result in a windfall for enterprising plaintiffs' attorneys, who can circumvent FERC's comprehensive regulatory scheme by simply identifying some practice of interstate gas companies that impacts gas prices, locating a plaintiff who purchased natural gas at retail in a state with generous antitrust damages provisions, then filing suit seeking damages under state consumer protection laws. WLF firmly believes that FERC, not the plaintiffs' bar, should be deciding how interstate natural gas practices are regulated.

STATEMENT OF THE CASE

In 1938, Congress enacted the NGA, which gives the federal government exclusive authority to regulate the wholesale natural gas market, including the practices of natural gas companies affecting wholesale gas rates. *See* 15 U.S.C. § 717 *et seq.* Under §1(b) of the NGA, the FERC enjoys exclusive jurisdiction over (1) the "transportation of natural gas in interstate commerce," (2) most sales of natural gas at wholesale, and (3) "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b).

The NGA also authorizes FERC to ensure that rates for jurisdictional sales are "just and reasonable." 15 U.S.C. § 717c. To accomplish this aim, § 5 of the NGA empowers FERC to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a).

Petitioners are natural gas companies governed by the NGA and FERC's comprehensive regulatory scheme. Respondents, several commercial and industrial end users of natural gas, sued Petitioners in various states under state antitrust law. Pet. App. 67a. Respondents' complaints alleged that Petitioners had engaged in a practice of improperly inflating index rates[2] for natural gas,

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[2] Index rates are published rate compilations, as reported by industry publications, which buyers and sellers use to price natural gas in the wholesale and retail markets.

which allegedly caused Respondents to pay higher retail rates. *Id.* at 14a-15a. The Panel on Multidistrict Litigation consolidated the suits in the District of Nevada. *Id.* at 12a.

Because the evidence was undisputed that Petitioners' alleged practices would necessarily increase wholesale gas prices as well as retail prices, Petitioners moved for summary judgment on the grounds that Respondents' state-law claims were preempted by the NGA. Pet. App. 110a-111a. In other words, Petitioners argued that Respondents' state law claims sought to regulate a "practice . . . affecting" wholesale gas rates under 15 U.S.C. § 717(d)a. *See id.* at 111a.

The district court agreed. Granting summary judgment in favor of Petitioners, the court found that any index manipulation by Petitioners would have unquestionably affected jurisdictional wholesale gas rates. Pet. App. 110a-111a. As a result, the practices challenged by Respondents under state law were subject to FERC's authority over jurisdictional sellers, and thus the state law claims were preempted. *Id.* at 75a. As the district court explained, "[b]ecause FERC's jurisdiction is exclusive where it exists, any state law claims based on any such practices [*i.e.*, those affecting wholesale gas rates] are preempted." *Id.*

On appeal, the Ninth Circuit reversed. Pet. App. 25a. Relying on its earlier opinion in *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007), a decision based almost entirely on the filed-rate doctrine, the appeals court rejected the district court's holding that the NGA provides for

exclusive federal jurisdiction over any practice by a FERC-jurisdictional seller that affects jurisdictional rates. Pet. App. 25a-28a. The panel concluded that federal preemption turns not on whether the lawsuit would have the effect of regulating in the federal field, but rather on the specific kind of transaction (retail or wholesale) by which plaintiffs sustained their alleged injuries. *Id.* According to the appeals court, because Respondents allegedly suffered harm in retail transactions, and the NGA does not regulate retail sales, no preemption exists. *Id.* Under the Ninth Circuit's view, then, state antitrust law trumps FERC's plenary authority any time a practice affecting wholesale rates also happens to affect retail rates.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding simply cannot be squared with this Court's longstanding preemption precedents under the NGA. Since Congress enacted the NGA in 1938, the Court has consistently recognized that Congress intended the NGA to unify regulation in the natural gas wholesale market and to squarely place authority over that market with FERC. At the same time, the Court has taken a dim view of those approaches, such as the one adopted below, that would allow states to disturb the uniformity of the federal scheme that Congress put in place. In drawing the line between state regulations that impair FERC's authority and those that do not, the Court has emphasized that state regulation is preempted if it is "directed at . . .things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

The decision below ignores this well-settled view. Under the Ninth Circuit's approach, Respondents' claims are not preempted because they invoke only the state courts' supervision of state *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But § 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). The fact that a given practice may affect retail rates *as well as* wholesale rates is of no consequence. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-court actions are "directed at" conduct in the field that the NGA occupies.

If plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field-preemption precedents will be rendered a dead letter. By permitting private plaintiffs to second-guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how best to regulate natural gas companies' conduct affecting wholesale rates. And given the outsized antitrust damages available in some of the states involved here, the tail of state-law regulation would wag the dog of federal regulation under FERC. That outcome is hardly consistent with the Supremacy Clause. If federal regulatory agencies are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free

from hindrances imposed by state law, how best to regulate jurisdictional conduct within their given field of expertise.

The Ninth Circuit's preemption analysis turns not so much on any underlying legal principle, but rather on the ability of the ever-creative plaintiffs' bar to identify a wholesale-market practice in the natural gas field that may also plausibly be said to affect prices in the state's retail market. Because the success of that endeavor hinges primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. But a single plaintiffs' lawyer should not be permitted to trump FERC's expertise to decide whether nationwide practices affecting the wholesale market are permissible. Unless reversed by this Court, the Ninth Circuit's decision thus threatens to disrupt the uniform federal regime envisaged by Congress by allowing attorneys motivated by large jury awards rather than regulatory aims to create potentially 50 different (often conflicting) state regulatory regimes binding the natural gas industry.

Finally, contrary to the view of the Ninth Circuit, permitting state antitrust lawsuits to go forward will not "complement" federal efforts to ensure fair competition. Rather, Respondents' state-law suits threaten to create a wildly inconsistent patchwork quilt of state-by-state regulation of the natural gas market. Such a 50-state mishmash of antitrust regimes cannot possibly be harmonized with Congress's goal of achieving a uniform federal standard for the natural gas wholesale market. For

that reason, this Court has routinely found such state laws preempted even if the state law in question purports to enforce exactly the same standards for exactly the same reasons.

ARGUMENT

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THIS COURT'S OWN PRECEDENTS

The question of whether a state law or rule is preempted by federal law turns on the intent of Congress, which is the "ultimate touchstone." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent of Congress can be determined if it is "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

When Congress enacted the NGA 75 years ago, it explicitly recognized the importance of uniform federal regulation of the natural gas industry. Because "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," § 1(a) of the NGA provides that uniform regulation of such businesses "is necessary in the public interest." 15 U.S.C. § 717(a). Informed by that clear statement of Congressional policy, this Court has consistently identified uniformity as the central purpose of the NGA, holding that the NGA unifies regulation in the natural gas wholesale market and squarely places authority over that market with FERC. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S.

591, 609-610 (1944) (stating that the "basic purpose" of the NGA was to "occupy the field" as to the "fixing of 'just and reasonable' rates").

At the same time, this Court has scrutinized those approaches that would allow the states to "disturb[] the uniformity of the federal scheme," in light of concerns that such state regulation might "seriously impair [FERC's] authority to regulate" jurisdictional sellers who would then "be forced to comply with varied state regulations of their . . . practices." *Transcon. Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 420-23 (1986). In distinguishing state regulations that impair FERC's authority to regulate the field from those that do not, the Court has consistently held that a state regulation is preempted, regardless of its purported subject area, if it is "directed at . . . things over which [the NGA] has comprehensive authority." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

In *Schneidewind*, for example, the Court found that the NGA preempted a Michigan statute that required companies transporting natural gas in-state to obtain state approval before issuing securities. Although nothing in the NGA expressly authorizes FERC to regulate the issuance of securities, the Court nevertheless found that Michigan's law "amount[ed] to regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy." *Id.* at 304. In so holding, the Court looked to the Michigan law's purpose, which was to prevent natural gas companies from raising equity levels above a certain point so as to ensure that the companies "will charge

only what Michigan considers to be a 'reasonable rate.'" *Id.* at 308. The Court held that such an approach constituted a "regulation of rates" under the NGA and was thus preempted.

Likewise, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 360 n.6 (1988), the Court determined that an agreement among four power companies to allocate power from a nuclear power plant constituted a "contract affecting the wholesale rates . . . of those companies." Consequently, the Court held that Mississippi could not regulate that contract even under the state's undisputed power to regulate retail rates. *Id.* at 374. As the Court explained, "States may not regulate in areas where FERC has properly exercised its jurisdiction to . . . insure that agreements affecting wholesale rates are reasonable." *Id.* As a result, the Court found the state law preempted even though Mississippi was purporting to exercise its power to regulate the *retail* market. *Id.*

The Ninth Circuit's holding simply cannot be reconciled with these precedents. Under the appeals court's approach, Respondents' state law claims are not preempted because they invoke only the state's supervision of *retail* transactions, which are outside of FERC's jurisdiction, as opposed to wholesale transactions. But that misguided approach asks the wrong question. As this Court's prior holdings make clear, the relevant question is whether Respondents' state-law actions are "directed at" conduct in the field that the NGA occupies. The answer to that question is yes—Respondents' suits obviously seek to punish Petitioners' alleged price-reporting and index-manipulation practices (which affect wholesale

rates for natural gas as much as they affect retail rates).

Yet § 5 of the NGA exclusively reserves to FERC the power to regulate natural gas sellers with respect to "any rule, regulation, practice, or contract . . . affecting" a "rate . . . subject to the jurisdiction of the Commission." 15 U.S.C. § 717d(a). Under this Court's own NGA-preemption jurisprudence, then, Respondents' claims are preempted. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) (holding that the NGA "leaves no room either for direct state regulation" in the field "or for state regulations which would indirectly achieve the same result"). Just as *Northern Natural Gas* held that indirect state regulation may not conflict with the NGA, so too state antitrust laws administered by courts may not conflict with the NGA. If instead, as the Ninth Circuit insists, plaintiffs are allowed to manipulate state-law duties as a backdoor way to regulate practices that affect wholesale rates for natural gas, this Court's field preemption precedents will be rendered a dead letter.

II. THE NINTH CIRCUIT'S RULE WOULD DISRUPT A UNIFORM INTERSTATE REGULATORY SCHEME AND SERVE AS AN UNNECESSARY DRAG ON FREE ENTERPRISE

By permitting private plaintiffs to second guess FERC under the guise of state-law civil suits, the decision below permits juries to reach judgments that differ from FERC's as to how to regulate the conduct of natural gas companies that affect wholesale rates. But if federal regulatory agencies

are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free from hindrances imposed by state law, how best to regulate jurisdictional conduct in their given field of expertise. At the same time, allowing juries to award damages under potentially conflicting state laws would interfere with Congress's delicate balance of statutory objectives and adoption of a uniform federal regulatory scheme, including enforcement via federal antitrust law.

Under the Ninth Circuit's rule, whether a state is permitted (under the Supremacy Clause) to regulate any given wholesale-market practice in the natural gas field hinges on whether that practice can also plausibly be said to affect prices in the state's retail market. Because this approach turns primarily on the semantics of how broadly the issue is framed, a creative plaintiffs' lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. In other words, the Ninth Circuit's preemption analysis turns not on any underlying legal principle, but merely on the amply demonstrated ability of the plaintiffs' bar to identify a suitable party plaintiff.

Natural gas is a fungible commodity widely distributed through a variety of distribution channels, and the interstate markets for natural gas are closely interrelated. It only takes a modicum of imagination to argue that virtually *anything* that happens in the wholesale market, or any other area of the natural gas market regulated by FERC, ultimately affects retail, end-use buyers. Plaintiffs' attorneys will have no trouble finding an economist who, for a fee, will gladly testify that the alleged

industry practice in question—whether it be an accounting practice, shipping practice, or (as here) a price-reporting practice—impacts wholesale and retail rates alike.

As here, a ready supply of potential plaintiffs will not prove difficult to find. Many large end-users of natural gas—including the Respondents in this case—purchase their gas directly from the interstate market, so as to eliminate the costs that accompany a middleman distributor. *See* Am. Petroleum Inst., *Understanding Natural Gas Markets* 19 (2006) ("[M]any industrial customers have the option to purchase natural gas from a marketer or producer instead of from the distribution company."). Once an entrepreneurial plaintiffs' attorney is successful in signing up direct retail purchasers (such as Respondents) as clients, suddenly a state-law claim that would have been preempted for a wholesale purchaser becomes *not* preempted under the Ninth Circuit's rule.

Armed with a suitable plaintiff and a plausible argument for affecting retail rates, the plaintiffs' bar will be able to use the Ninth Circuit's rule to wrest regulatory control away from FERC on matters as technical as how a natural gas wholesaler accounts for depreciation, how it allocates costs of capital expenditures, or how it hedges against financial risk. If a plaintiff can argue that any of these practices affect retail rates, even by merely affecting a natural gas company's cost structure, then the Ninth Circuit's rule will pave the way for the plaintiff to avoid preemption and impose state-law duties on a federally regulated industry. That cannot possibly be the result that Congress intended,

which is why this Court forestalled that possibility with its prescient earlier holdings in *Schneidewind*, *Mississippi Power*, and *Northern Natural Gas*.

Such technical regulatory issues are squarely within FERC's ambit, and only FERC has the required expertise and broad view of the market to regulate natural gas wholesalers intelligently and consistently. But if the Ninth Circuit's approach to preemption is allowed to stand, juries in state courts throughout the country will be empowered to decide whether any given practice—no matter how technical—is inappropriate and subject to liability.

For example, a business transaction that FERC rightly understands to be a bona fide financial hedge—the sort of hedge that American companies engage in every day for perfectly legitimate financial reasons—could now be deemed "manipulative" by a jury applying one of 50 different states' laws, resulting in massive liability for the natural gas company. Even worse, many of these suits are brought as class actions, where only a fraction-of-a-cent impact on each unit of natural gas sold can quickly add up to hundreds of millions of dollars in the hands of a sufficiently motivated plaintiffs' attorney and his experts.

Amicus WLF believes strongly that companies should not be put in a position where they cannot dependably rely on FERC's guidance about what they may and may not do. Nor should a single plaintiffs' lawyer be permitted to trump FERC by deciding whether nationwide practices affecting the wholesale market—practices routinely engaged in by all or most of the natural gas industry—are

permissible. Such uncertainty is the antithesis of the rule of law. Unless reversed by this Court, the Ninth Circuit's decision will disrupt FERC's uniform regime by allowing attorneys motivated by large jury awards to create their own new binding rules for the natural gas industry.

In any event, the Ninth Circuit's highly idiosyncratic approach to field preemption is unnecessary to combat truly anticompetitive practices. This Court has long recognized that the NGA does not displace *federal* antitrust suits challenging the allegedly anticompetitive practices of natural gas companies. *See, e.g., California v. FPC*, 369 U.S. 482 (1962). WLF believes that Respondents' state-law claims are chiefly motivated by a desire to take advantage of certain states' more liberal antitrust damages provisions, *see* Pet. 27-28, and to avoid the unifying force of this Court's antitrust doctrines, by taking refuge in often less well-developed and more plaintiff-friendly state court antitrust jurisprudence. While such state laws may garner much higher jury awards, and thus higher fees for plaintiffs' attorneys, Congress has already determined that such laws are unnecessary to ensure a competitive market for interstate natural gas.

The natural gas industry has proven to be an economic boon throughout much of the country. Unless reversed, the holding below will create vast uncertainty in the marketplace, potentially deterring industry stakeholders from investing hundreds of millions, if not billions, of dollars into the natural gas market, producing an unnecessary drag on the free-market economy. To arrest the harmful

nationwide implications of the Ninth Circuit's opinion, WLF respectfully urges this Court to reverse the misguided holding below.

III. DUAL STATE AND FEDERAL REGULATION OF THE NATURAL GAS WHOLESALE MARKET IS NOT "COMPLEMENTARY"

Equally misguided is the Ninth Circuit's suggestion that state antitrust laws can somehow avoid federal preemption because they merely "complement Congress's intent to move to a less regulated market" by "support[ing] fair competition." Pet. App. 27a. As this Court has repeatedly held, complementarity is no defense against field preemption: "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to do." *United States v. Locke*, 529 U.S. 89, 115 (2000) (quoting *Charleston & W. Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915)).

The Court has routinely found such "complementary" state laws to be preempted even if the state law in question purports to enforce exactly the same standards, for exactly the same reasons. *See, e.g., Arizona v. United States*, 312 S. Ct. 2492, 2502 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235 (1947) ("[I]f a licensed warehouseman complied with each requirement, he did all that he need do. He could not be required by

a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act."). Simply put, a separate system of state regulation over the natural gas wholesale market is not "complementary," despite sharing the goals of the NGA, because it conflicts with and disrupts a clear federal policy of uniformity. In any event, none of the generally applicable antitrust state laws at issue here are expressly aimed at natural gas, so it strains credulity for the Ninth Circuit to suggest that they were enacted with an eye toward complementing the NGA.

The Ninth Circuit's flawed analysis also ignores the messy potpourri of state regulation as it is actually practiced across the nation. Suffice it to say, the 50 states are hardly unanimous in their views as to what practices should count as "anticompetitive." What one State may deem as deceptive, another State may view as a perfectly legitimate business transaction. Indeed, "[t]here is much disagreement as to the meaning of a 'competitive' market, and, therefore, when antitrust law should intervene." *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 869 (Tenn. 2010). To suggest, as the Ninth Circuit does, that potentially 50 different state antitrust regimes regulating the natural gas market would somehow "complement" the uniform federal scheme ignores that reality.

Rather than complement the uniformity provided by the NGA, Respondents' state-law suits threaten to create a wildly inconsistent patchwork quilt of state-by-state regulation of the natural gas market. In many instances, state antitrust laws are

more generous than their federal counterpart in compensating victims of purportedly anticompetitive conduct. And the remedies available under state law for antitrust violations differ not only from the federal remedy provided by the Clayton Act, but from one state to another. Colorado, for example, permits antitrust plaintiffs to recover the full price paid for a good as damages. *See* Colo. Rev. Stat. § 50-115 (2011). That is a far greater recovery than a direct purchaser can obtain under federal law, which limits recovery to only treble the amount the defendant allegedly overcharged for the product. *See Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 203 (1990)(stating that damages under the Clayton Act are limited to treble the amount the direct purchaser was overcharged, plus costs and attorney fees).[3] Still other states, such as Minnesota, permit such treble recovery even for indirect purchasers. *See* Minn. Stat. § 325D.57. The Ninth Circuit's holding thus displaces the NGA's uniform federal standard with a cacophony of state-law rights and remedies.

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[3] A finding of preemption will not necessarily deprive aggrieved purchasers of any remedy whatsoever. They are perfectly free to bring federal antitrust claims under the Clayton Act, albeit not for the windfall recovery amounts being sought here under state law. Such purchasers may also have resort to FERC administrative proceedings to petition for a refund. In 2005, for example, FERC facilitated over $6.3 billion in settlements arising from claims of market manipulation during the California electricity crisis. *See* Federal Energy Regulatory Commission, *The Commission's Response to the California Electricity Crisis and Timeline of Distribution of Funds*, Dec. 27, 2005, *available at* www.ferc.gov/legal/staff-reports/comm-response.pdf.

The Ninth Circuit's rule also engenders considerable uncertainty throughout the natural gas industry because it is impossible to predict in advance precisely when and how retail rates may be affected by practices that fall within FERC's jurisdiction. For practical, economic reasons, many natural gas companies will simply not be able to individually tailor their practices on a state-by-state basis. In such cases, those companies will be forced to conform all of their practices to the antitrust laws of the most restrictive state within which they conduct business. But such a result would ultimately make the states, not FERC, the final arbiter of practices that affect wholesale and retail natural gas rates. Again, that is clearly not what Congress intended.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the holding of the Ninth Circuit.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARKHAM S. CHENOWETH
WASHINGTON LEGAL
FOUNDATION
2009 Ma[illegible] Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

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